IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A539/2017

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

15 December 2017
DATE

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SIGNATURE

In the matter between:

Matthew Benson — **Appellant**

and

State — **Respondent**

Coram: **Munzhelele AJ**
Heard: **11 December 2017**
Delivered: **15 December 2017**

JUDGMENT

MUNZHELELE AJ:

Background

[1] The appellant was refused bail by the Magistrate court of Brits on the 29 September 2017. He lodged an appeal to this Court against such refusal by the Magistrate, to release him on bail pending trial. He is facing charges of murder and two attempted murder which has been referred to in the record as a Schedule 5 offence.

Appellant was arrested on 16 September 2017. The bail application was launched on 22 September 2017.

Facts

[2] On 2 August 2017 three men decided to go to the nearby farms to steal scrap metal. After entering the farm of the appellant and neighbouring one to commit theft, a person whom they identified as the appellant saw them. The appellant pursued them.

[3] They took flight but' shots were fired in their direction. One of the three men was struck by a bullet on his leg. His two friends assisted by carrying him further, as he could not walk by himself.

[4] As they ran carrying their friend firing continued. The wounded person weakened. The other two left him behind underneath a tree. They continued with their flight up a mountain and escaped from the appellant. From a distance they observed that a tractor with a trailer and a "bakkie' were parked where they had left their injured friend. They also observed a black and a white male standing where they left the injured person. They ran to their home and immediately reported the incident to the mother of their injured friend. The mother only reported the incident

to the South African Police Services the next day after her son did not return home. The South African Police opened a missing person's report and searched for the missing and wounded person at the farm. They could not find him.

[5] The subsequent police investigation revealed the following:

A trail of blood was discovered on the farm where the wounded person was travelling and where he was left by his friends.

Forensic analysis determined that the DNA (blood) found at the crime scene matched the DNA obtained from the missing person's mother which was obtained for comparison purposes;

[6] 9MM firearm cartridges were found and collected at the crime scene. The two persons that managed to escape pointed out where the appellant fired shots at them. Ballistic tests confirmed that the cartridges found at the scene of incident matched the firearm seized from the gun safe of the appellant.

[7] Forensic analysis of the swab collected from the passenger door window winder of the motor vehicle driven by the appellant on the day of the incident was found to be of human origin.

[8] On the day of the incident the appellant alerted and requested the assistance of a neighbouring farmer manager, Mr Louwrens, as he had observed criminals on the farm.

The neighbour responded and upon his arrival observed the appellant with a 9MM pistol in his hand.

Two employees working on the neighbouring farm confirmed that the sound of a gunshot was heard on the farm where the missing person was shot and wounded. To date the missing and wounded person has not returned to his home following the incident. A diligent search for his body using inter alia aerial surveillance and sniffer dogs proved to be futile.

[9] From the outset when bail application was heard at the court a quo the appellant and the respondent submitted that this was a schedule 5 bail application, meaning that the application would fall within the provisions of section 60(11) (b) of the Criminal Procedure Act 51 of 1977. The onus rests with the appellant, to satisfy the court on a balance of probabilities, that the interest of justice permitted his release on bail.

[10] However during arguments on appeal the appellant raised a concern that the doubtful charge of murder brought against him could never factually elevate the bail application into the ambit of schedule 5 and 60(11) (b) of the criminal procedure act.

[11] The appellant further argued that the offences of attempted murder were not involving the infliction of grievous bodily harm as such schedule 5 was not applicable. Respondent did not argue this point during appeal. However the respondent submitted that this issue was common cause between the parties during the application for bail as the appellant was charged with offences referred to in schedule 5.

[12] Respondent argued that the onus rested with the appellant who has to adduce evidence first to prove on a balance of probabilities that the interest of justice permit his release on bail.

[13] Section 60(1 1)(b) of Act 51 of 1977 reads as follows:

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, the court shall order that the accused be detained in custody until he 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 interest of justice permit his release"

[14] The appellant commenced proceedings by reading into record an affidavit outlining reasons the magistrate should consider when deciding the question; whether it will be in the best interests of justice to realise him on bail. In his affidavit he excludes the likelihood of the factors mentioned in section 60(4) (a) to (e).

[15] Appellant mentioned that, he did not have previous convictions. He is a South African citizen staying at Mooinooi in Brits. He was gainfully employed by his father. He is 24 years old. He has presently been staying at Benico Biele 10 Brits with Charlene Oosthuizen, his girlfriend. The address has been confirmed by colonel Thlapi. The appellant in possession of a passport. He alleges that, he is not a danger to the public or any person neither will he commit a schedule 1 offence.

[16] If released he alleges that he will never evade trial or flee. The appellant mentioned that he will not intimidate witnesses or influence or destroy any evidence. He states that he will not jeopardise the functioning of the criminal justice system. He alleges that he knows nothing about the alleged offence. He alleges that his continued incarceration can only prejudice him as he won't be able to properly prepare for his trial. He alleges that his release will not undermine the public peace, security or disturb the public order.

[17] The respondent on the other hand called the investigating officer, colonel Thlapi who testified under oath. Under cross examination there was an issue about the type of firearm which was seen by the witnesses and the type of firearm seen by Mr Lawrence. The investigating officer confirmed the address where the appellant stays together with his girlfriend. He indicated that the appellant might interfere with the witnesses if released on bail. In examination-in chief the investigating officer was asked whether the appellant would evade trial and whether he is a flight risk. The investigating officer responded to the effect that the appellant will not evade the trial or abscond. Under cross examination by the defence counsel he then said that the appellant can evade trial if given bail. The investigating officer further said that if the appellant is released on bail, the members of community may disturb the public peace and the appellant's security is not guaranteed. Because of this case and the missing wounded person the community has vandalised and damaged property at the appellant's farm.

[18] Therefore there is no telling what members of the community the people might do. The investigation is still in progress, therefore the release of the appellant might jeopardise such investigations. The investigating officer alleged in his evidence that, the appellant will interfere with witnesses if released on bail.

[19] Section 65(4) of the Criminal Procedure Act 51 of 1977 (CPA) provides that:

'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'.

[20] Section 60(9) of the CPA provides that

'In consideration of whether the interests of justice permit the release of an applicant on bail the Court should decide the matter by weighing up the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice which he or she is likely to suffer'.

[21] In ***S v Barber*** 1979 (4) SA 218 (D) Hefer J stated as follows (at 220E-H)

> *"It is well-known that the powers of this Court 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."*

[22] In denying appellant 's admittance to bail the magistrate took into consideration the facts surrounding the offences, the personal circumstances of the appellant, and the provisions of section 60(4) to 60(8) of the Criminal Procedure Act 51 of 1977. He considered that the release of the appellant will endanger the safety of the public in that the community is outraged by the incident and they had destroyed the property of the appellant's father. There is no telling what the appellant might do to them if released.

[23] The magistrate considered the likelihood that the appellant might attempt to evade trial. In that he has a passport. There is a strong case against the appellant. The sentence which can be imposed to the accused if found guilty is hefty in terms of section 51 of the Criminal Law Amendment Act 105 of 1997. Therefore he might be tempted to abscond.

[24] The magistrate considered the likelihood that the accused might attempt to influence or intimidate witness much as he may conceal or destroy evidence. In this regard the magistrate considered that Mr Lawrence and the other witnesses are staying in a farm adjacent to that of the appellant. There is the likelihood that he might interfere with these witnesses. The magistrate was influenced by the fact that the body of the injured person left in the appellant's farm went missing until today while evidence is to the effect that the appellant was the one who shot the injured person on the day of the incident. The evidence was tempered with. This is the reason why the wounded person has disappeared from the farm.

[25] The Magistrate considered the likelihood that the appellant if released on bail will undermine or jeopardise the proper functioning of the criminal justice system. He considered that the appellant lied when he said that he did not possess a nine millimetre pistol when Mr Louwrence said that he saw appellant in possession of such a firearm on the date of the incident.

[26] The magistrate also considered that the release of the appellant might disturb public order or undermine the public peace or security in that the community is outraged by the fact that the body of the person who was left on the appellant's farm has not been found. The community damaged the property found at the appellant farm. Therefore there is a likelihood that the community might take the law into their own hands or they might be shocked or outraged by the decision of the court to release the appellant on bail.

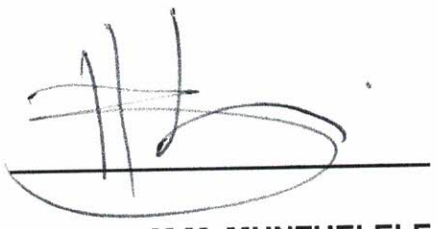
[27] The court finds that the magistrate did not misdirect himself when proceeding with the bail application when she ruled that the onus rest with the

appellant. The appellant was charged with an offence referred to in schedule 5. The parties agreed on the applicability of schedule 5 procedure laid down on section 60(11)(b). The court can neither fault the prosecutor for preferring to charge the appellant with an offence referred to in schedule 5. The onus in this bail application was correctly placed on the appellant to prove that the interests of the justice permit his release on bail

[28] It is also clear from the judgement of the magistrate at the bail court that he has weighed up the considerations referred to in subsection 60(4)(a) to (e) and section 60(5) to (8) of the criminal procedure act 51 of 1977 and then exercise a value judgment according to all the relevant criteria on the facts placed before him. He further weighed the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody. The court is satisfied that the decision for denying bail was correct therefore the court will not interference with the magistrate's exercise of his discretion. Therefore, the appeal must fail.

[29] In the result, I make the following order:

29.1 The appeal is hereby dismissed



M.M. MUNZHELELE

ACTING JUDGE OF THE HIGH COURT

For the appellant:	Adv. P. Van Wyk, SC
Instructed by:	Taute, Bouwer and Cilliers Inc
For the respondent:	Adv A. Wilsenach
Instructed by:	State Attorney