




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A81/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
SIGNATURE	05/05/2021 DATE

In the matter between:

STEVE HLONGWANE

Appellant

v

THE STATE

JUDGMENT

MOSOPA, J

1. The appellant brought a bail application on 12 November 2020 in the Magistrates' Court for the district of Tshwane North, Pretoria before Magistrate Grove, which was refused on 3 December 2020.

2. Aggrieved by this decision, the appellant brought an appeal against this refusal to grant him bail, in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the Act").
3. The matter served before me on 31 March 2021 and after hearing argument on behalf of the parties, I then reserved judgment in the matter.

BACKGROUND

4. The appellant was arrested and charged with three (3) counts of murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, in respect of his colleagues, and one (1) count of theft, in respect of a cellphone belonging to one of the deceased.
5. It was agreed by the parties while the matter was still before the below court, that the charges against the appellant fall under Schedule 6 of the Act.
6. The bail application of the appellant was opposed by the State. Both the appellant and the respondent filed affidavits in support of and opposing the bail application, respectively, and the bail application was determined on the basis of the affidavits filed.

DISCUSSION

7. Section 60(11)(a) of the Act, which deals with offences under Schedule 6 of the Act, provides;

"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) 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 which in the interest of justice permits his or her release."

8. From the above, it is clear that the bail applicant charged with an offence under Schedule 6, will not be released from custody until he/she does the following:
 - 8.1. adduces evidence that satisfies the court hearing the bail matter, that exceptional circumstances exist; and
 - 8.2. shows that the interest of justice permits his or her release on bail.
9. It must further be noted that the concept of "exceptional circumstances" is not defined in the Act. As a result, the concept must be given its ordinary meaning. What a court is expected to do is to examine all the relevant considerations, as a whole, in determining whether an accused person has established something out of the ordinary or unusual which entitles him or her to relief under section 60(11)(a). (See **S v H 1999 (1) SACR 72 (W)**).
10. Section 60(4)(a)-(e) of the Act is also relevant and deserves mention, and provides:

"(4) The interests of justice do not permit the release from detention of an accused where one or more of the following are established:

 - (a) where there is a 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 a likelihood that the accused, if he or she is released on bail, will attempt to evade his or her trial; or*
 - (c) where there is a likelihood that the accused, if he or she is released on bail, will attempt to influence or intimidate witnesses to conceal or destroy evidence; or*
 - (d) where there is a likelihood that the accused, if he or she is released on bail, will undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system; or*

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

11. The below court, when refusing the appellant bail, considered a number of factors and concluded that,

“The applicant has failed to prove that there is exceptional circumstances by section 60(4)(a) that he be released on bail, besides having failed dismally during the first leg of the enquiry to satisfy the court that exceptional circumstances exist. He has failed in respect of the second leg, and the enquiry to satisfy the court that it would be in the interest of justice for him to be admitted to bail.” (sic)

12. Despite being arraigned on charges which fall under Schedule 6 of the Act, the appellant, in his affidavit in support of the bail application makes mention of the provisions of section 60(11)(b) of the Act, which is the incorrect provision. The appellant does not specify in his affidavit what the factors are which constitute “exceptional circumstances”, save to mention that it is his employer at FBI Security, Thabo Hlongwane, who shot at the deceased and he was instructed to dispose of their bodies, remove the SIM card from the cellphone of one of the deceased and destroy both the SIM card and cellphone.
13. The affidavit of the investigating officer, which remains unchallenged, reveals that he obtained the section 205 information in respect of the cellphone of one of the deceased, which indicates that the appellant inserted his own SIM card into the cellphone of one of the deceased (Bongani Konang). A further SIM card belonging to Betty Baloyi (the mother-in-law of the appellant) was inserted into the cellphone of another one of the deceased on 5 April 2020 – a day after the shooting incident – but she declined to take possession of this cellphone. On 18 May 2020, the appellant was still using the cellphone belonging to one of the deceased and his explanation to the investigating officer was that he borrowed a cellphone from the deceased on 31 March

2020, as his own cellphone was no longer operational. This contradicts what the appellant said in his affidavit, that he was instructed by Mr Thabo Hlongwane to destroy the cellphones.

14. The appellant has a previous conviction of theft, dating back to 2007. The appellant was released on bail while awaiting finalization of the trial matter and there is no evidence which indicates that he breached his bail conditions. The issue of the appellant being a flight risk arose in the appellant's bail proceedings in respect of this matter. What is important is the averment that the appellant and his wife reside in an informal settlement, with no house number, but his mother is willing to accept him at the address in Winterveld. The appellant further avers that he fears for his life as his former employer, Mr Thabo Hlongwane, knows that he has implicated him in the murders.
15. In further denying the appellant bail, the below court relied on the provisions of section 60(4)(c), where it was found that if the appellant was released on bail, he will attempt to influence or intimidate witnesses, or attempt to conceal or destroy any evidence. Further, that the appellant was in possession of one of deceased's cellphones. In the affidavit, it was further mentioned that the appellant knows the identity of the state witnesses and is also familiar with the type of evidence which may be brought against him.
16. It is important to note that when the deceased were discovered, they still had their service firearms, but all their cellphones were missing, the appellant was also of assistance in the discovery of the third deceased as it took some time to find the body of the third deceased. The appellant's version of events is doubtful; if indeed all the deceased were killed by Mr Thabo Hlongwane, why would he not take back his property, the firearms in the possession of the deceased. Further, that the deceased's cellphone was in use for a period of one month after the death of the deceased and was found in the possession of the appellant, with his SIM card in the phone.
17. The below court, in denying the appellant bail, further relied on the provisions of section 60(4)(e), which provides that where there is a likelihood that the

release of the appellant will disturb the public order and undermine the public peace and security. This finding was based on what the investigating officer averred in his opposing affidavit, that the community was involved in the search for all the deceased and they vowed that when the bodies were found and if the appellant is released on bail, they would take the law into their own hands. This clearly shows that there was outrage from the community following what the appellant is now charged with.

18. Apart from establishing one of the grounds stated under the provisions of section 60(4)(a)-(e), it is important for the court to determine whether the grounds set out under section 60(4)(a)-(e) are probable for the court to deny the applicant bail. (See **S v Stanfield 1997 (1) SACR 221 (C)**). In my considered view, the below court did consider the probability of the grounds existing, in that, the identity of the witnesses is known to the appellant and he was able to possess the two cellphones belonging to the two deceased for some time without the police detecting that. The utterances made by the community remain unchallenged and taking into account that the appellant resides in this same community, thus the possibility of these threats coming to fruition is likely.

GENERAL

19. The requirement in section 60(2)(c) that evidence be adduced in bail proceedings by either the state or appellant, should not be interpreted as a demand for the presentation of oral evidence. The party who is called upon to adduce evidence, is entitled to do so, in terms of the normal "relaxed rules of evidence", which have traditionally been applied in bail proceedings (**S v Hartslief 2002 (1) SACR 7 (T)**). Affidavits, in general, should be received. (**S v Pienaar 1992 (1) SACR 178 (W)**).

20. The functions and powers of the court or judge hearing the appeal under section 65 are similar to those in an appeal against conviction and sentence. In **S v Barber 1979 (4) SA 2018 (D)** at 220E-H, Heher J observed;

"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..."

21. Section 65(4) of the Act is more relevant and provides as follows:

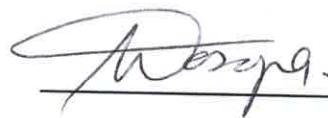
"(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

22. I am not persuaded as to how the below court misdirected itself which empowers this court to interfere with its decision. The below court did not err, in my considered view, when denying the appellant bail and as such, the appeal brought ought not to succeed. Moreover, the state has a strong case against the appellant.

ORDER

23. As a result, I make the following order;

1. The appeal against the decision of the Magistrates' Court, Pretoria North to deny the appellant bail is refused.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Mr P Sambo
Instructed by: Sambo and Makgabutlane Attorneys

For the respondent: Adv M Marriott
Instructed by: The DPP

Date of hearing: 24 February 2021
Date of judgment: Electronically delivered