IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION
MIDDELBURG
(LOCAL SEAT)

Case Number: BA01/24
Secunda Case Number SA505/2023

In the matter between:

NDUMISO WISDOM NDIMANDE Appellant

And

THE STATE Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 15 February 2024 at 10:00.

JUDGMENT – BAIL APPEAL

DATHOO AJ

INTRODUCTION

[1] This is an appeal by the appellant, Mr Ndumiso Wisdom Ndimande, against the refusal of bail by the Magistrate, Ms Kekana, of Govan Mbeki District Court sitting at Secunda.

[2] The appellant is presently appearing in the District Court, Govan Mbeki on two counts of attempted murder read with the provisions of section 51(1) Schedule 2 Part 1 of the Criminal Law Amendment Act, Act 105 of 1997 as amended ("the CLAA"), read with Section 1 of the Domestic Violence Act 116 of 1998 as amended. Count 1: The state alleges that the appellant attempted to murder his wife by shooting her 8 times in the body and attempting to shoot her in the head. Count 2: The state alleges that the appellant attempted to murder his 6-year-old stepson by shooting him once in the leg. In addition, he is charged for pointing of a firearm.

THE GROUNDS OF APPEAL

[3] The grounds of appeal are summarized as being the following:

3.1 That the magistrate erred in finding that the appellant has not discharged the onus to show that the interest of justice permits his release on bail more specifically on the following:

3.1.1 That the appellant will attend his trial until the matter is finalized;

3.1.2 That the appellant will evade his trial, there was no evidence to suggest this;

3.2 That the magistrate erred and misdirected herself in refusing the appellants application for bail;

3.3 That the magistrate erred and misdirected herself in failing to give proper regard to the following:

3.3.1 That appellant cooperated with the police and handed himself

over when he learnt that he was wanted by the police;

3.3.2 The only ground for refusal of bail was that appellant will interfere with witnesses, that there is no evidence suggesting that if granted bail he will interfere with the witnesses;

3.4 That the magistrate erred and was misdirected by the fact that she had insight of the docket before testimony was tendered by the respondents witness and that clouded her judgement and had an impact on the bail hearing;

3.5 The magistrate erred in weighing more on the seriousness of the allegations than the interest of justice as required by the law of Schedule 5 and thereby convicting the appellant at the bail stage;

3.6 That the magistrate erred in making a conclusive finding on the evidence of the investigating officer in relation to the safety of the witnesses, and thereby refusing the appellants bail application.

Factual Background

[4] The appellant has been charged with the attempted murder of his wife. It is alleged that he pointed a firearm at her head, pulled the trigger, the firearm jammed, he became furious and fired several shots. She was shot eight times and his 6-year-old stepson shot once in the leg. It is averred that the issues between appellant and his wife started a week prior as appellant and his 19-year-old stepson were not getting along. The appellant had no children with the complainant (his wife), he had 2 children of his own and the complainant had 3 children of her own.

[5] The appellant testified in support of his bail application. He set out his personal circumstances and the reasons he should be granted bail. He has no previous convictions, pending cases and no protection or harassment orders were issued against him. He intended pleading not guilty, he is willing to abide to bail conditions imposed and will stand trial. He would reside at his parental home in Barberton, which

was verified by the police. According to him, he and his wife fought over the firearm and one shot went off.

[6] The respondent opposed the appellant's bail application and in support of the opposition, the investigating officer testified, and an affidavit from the complainant (the wife) was read into the record and handed in. Detective Constable Mofokeng held the view that the appellant actually intended to kill his wife, that appellant had said he would kill the entire family. He feared the safety of the both complainants if the appellant was granted bail. In the affidavit deposed to by the complainant (wife of appellant) she states that she will feel unsafe if appellant is released on bail, and further that he had also previously threatened to kill her.

SUBMISSIONS MADE AND CONTENTIONS MADE ON BEHALF OF APPELLANT AND THE STATE.

[6] The legal representative of the appellant submitted that the Court is not supposed to withhold bail in order to punish the appellant or to demonstrate disapproval of the alleged crime committed by the appellant. He submitted that the appellant is not a flight risk and his addresses had been verified. He submitted that since the commission of the offence he has not intimidated the witnesses nor is there evidence that if he is released on bail that he will commit a serious offence. The legal representative referred the court to the case of **Jason Rhode v S**[1] and argued that after conviction of murder of his wife, the accused was granted bail pending the application to appeal against his conviction and sentence. He also referred to the Oscar Pistorius matter and submitted that the accused was granted bail after having murdered his partner. He submitted that bail is meant to secure the attendance of the accused person in court, that the appellant has proved his case, he is not a flight risk and the interest of justice permits his release. He contends that the appellant should not be kept in custody as a form of anticipatory punishment, he is still presumed innocent and intends pleading not guilty and that the interest of justice permits his release on bail.

[1] (1007/2019) {2019 ZASCA 193}

[7] In the written heads of argument submitted by Counsel for the appellant, it is submitted that the appellant is a South African citizen, he has no travelling documents as he submitted his passport to the police, that the appellant cooperated with the police, he handed himself over and is not a flight risk. He contends that there is nothing to indicate that the accused will not stand trial. He argues that the appellant can stay at the alternative address provided in Barberton and will be away from the residence of the victim and the witnesses. He contends that the seriousness of the state case and the strength of the state case cannot be ground for bail refusal and refers the court to the case of Rodney **Kenneth Landela and another v The State**[2].

[8] Counsel for the appellant submits that the magistrate refused bail because of the seriousness of the offence and for the protection of society, as such, she did not apply the test required for Schedule 5 bail applications. He argued that the appellant cannot be detained with the anticipation that he might get convicted. He will attend court and can afford an amount of R5000 for bail.

[9] The prosecutor confirmed that bail was opposed, that the appellant faces two charges that are listed in Schedule 5 and that in terms of Section 60 (11) (b)[3] ("CPA") the onus rests on the accused to satisfy the court that on a balance of probabilities the interest of justice permit his release. He submitted that the accused is married to the one complainant; they reside together with her children and his children. It is contended that the accused drove his vehicle to Barberton approximately 250 km away from the scene, that he passed the Secunda police station but did not report the matter at this police station. It is submitted that the appellant did this in order to evade being arrested. In addition, the court is urged to consider the threats made by the accused person when he said he was going to kill the complainant and the children. He submits that the purpose of bail is not only to ensure that the accused attends court but also to protect the victim and witnesses in the matter. He submits that the safety of the victim and children are at risk. He contends that the accused failed to give evidence to satisfy the court that the interest of justice permits his release and why bail should be denied.

[2] (A04/2017) [2017] ZAGPPHC 745 (30 November 2017)
[3] Criminal Procedure Act 51 of 1977

[10] In his written heads of argument, counsel for the state contends that the appellant has failed to show or establish that there was misdirection of fact on the part of the presiding judicial officer. He argues that there is a strong case against the appellant who places himself on the scene. It is contended that the safety and security of the witnesses in the matter is not guaranteed if the appellant is granted bail, as such, it is not in the interest of justice that he be granted bail. He submits that the degree of violence towards others is implicit in the charges against the appellant, that a bail risk may be more readily found to exist where the crime is a particularly violent one, or where the accused may harbor a motive to commit an act of violence against another person.

THE BAIL JUDGMENT

[11] In her judgement, the magistrate stated that while there are similarities between the current matter and the Jason Rhode and Oscar Pistorius matters referred to by the legal representative of the appellant in that they were gender based violence matters the difference is that the partners of the applicants/accused were deceased. The court seized with these matters did not have to deal with the possibility of the victims being threatened or intimidated as they were already deceased.

[12] She emphasized that the appellant in this matter not only threated but promised that he would kill the victim (his wife) and children if he did not get his lobola money back; that his wife was shot 8 times although appellant avers only 1 shot went off. She stated that it is averred that the appellant also shot his 6 year old stepson and that the witnesses are afraid of him. She found that the safety and security of the witnesses will be jeopardized if appellant is released on bail. She also found that even if the appellant was ordered to go and live in Barberton there was nothing preventing him to drive back approximately 250 km and shoot the witnesses. She also pointed out that the appellant instead of driving 10 to 15 km to the Secunda police station and handing himself over, he drove to Barberton on the night in question. She found that there was nothing on record to convince her that bail be granted and accordingly denied bail.

DISCUSSION

[13] The appeal to this Court is in terms of section 65(4) of the CPA, which states that:

> ***"65 Appeal to superior court with regard to bail***
>
> *(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."*

[14] From the above sub-section, it is thus apparent that the legislation provides that a decision regarding bail shall only be set aside if the Court on appeal is satisfied that the magistrate's decision was wrong. The magistrate hearing the bail application has a discretion to grant or refuse bail, within the context of section 60, in that respect, there can be no doubt. The question as to whether the magistrate's discretion was exercised wrongly is the one which the Court on appeal is required to answer, and to this end, the dictum of Hefer J in ***S v Barber***[4]*,* is apt:

> *"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"*[5]

[15] Having regard to the aforementioned authorities, the approach of the appeal

[4] 1979(4) SA 218 (D) at 220 E – F
[5] See also S v Branco 2002 (1) SACR 531 (W) at 533I; S v Porthen and Others 2004 (2) SACR 242 (C) para 16 – 17

Court when considering the refusal of bail, and whether the magistrate was wrong in doing so, requires a consideration of the accused person's liberty pending the outcome of his trial, balanced against the interests of society[6].

[16] Bearing in mind what is stated above; I then turn then to consider whether the magistrate was wrong to refuse bail to the appellant. The parties are in agreement that this is a Schedule 5 bail application and in terms of section 60(11)(b) of the CPA, the appellant bore the onus of establishing evidence which satisfied the Court on a balance of probabilities, that the interests of justice permits his release on bail. His testimony was straightforward and through which he established the following facts:

1. he had a fixed and monitorable address in Secunda and Barberton, which is his parental home;
2. He, was married with 2 children aged 16 and 7. They reside at his parental home;
3. He resided with his wife and her 3 children aged 19, 15 and 6;
4. He had no previous convictions; no outstanding warrants of arrest or protection orders issued against him;
5. He was self-employed, he transports children;
6. He had no assets outside the Republic of S. A and had a passport which was at his home 24;
7. He owns a licensed firearm, which the police have taken.

[17] In respect of the merits of the matter he explained that he and his wife had an altercation, a struggle ensued over his firearm and one shot was fired. He conceded that he immediately thereafter drove to Barberton to his parents. The incident happened on a Thursday, he contacted his lawyer after he spoke to his father and the lawyer arranged that he go to the police station on the Monday which he did. He wants to be released on bail as he pays rent for the place he lives at and needs to pay school fees for his children. He will reside in Barberton and not interfere with the witnesses; he is not a violent person.

[6] S v Conradie [2020] ZAWCHC 177 para 19 – 20

[18] From the bail proceedings, it was apparent that the investigating officer opposed bail on the basis of section 60(4)(c), namely the existence of a likelihood that the appellant will attempt to influence or intimidate witnesses or conceal or destroy evidence. He was of the view that the appellant, if released, will kill the complainants and the children as appellant threatened to do so. He also alluded to the seriousness of the offence and the hefty sentence that might be imposed. In addition, he handed in a statement from the wife of the appellant (the complainant in the matter) wherein she states that she feels unsafe if accused is released on bail as he actually wanted to kill her but the firearm jammed. In addition, she states that the appellant had also previously threatened to kill her and ran after the oldest child with a firearm and fired warning shots. She however did not report the matter.

[19] The first point to emphasis is that bail applications are *sui generis*, and that unlike a trial Court, the function of a bail Court is not to grapple with the innocence or guilt of the applicant, but to balance the interests of society in refusing bail against an applicant's interest to his/her liberty. Binns-Ward J in ***Conradie v S supra at paragraph 20***, states that this balancing act would entail that the bail Court:

> *"…will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making such assessment."* [7]

[20] While the presumption of innocence plays little or no role in a bail application, it bears remembering that it is evident from section 58 of the CPA that bail is non-penal in nature and the proper refusal of bail should not be viewed as a form of anticipatory punishment for the alleged offences which the applicant faces[8].

[21] Section 60(4)(c) of the CPA provides that one of the factors to be taken into

[7] see also Mafe v S [2022] ZAWCHC 108 par 143 Lekhuleni J, dissenting

[8] S v Noble and Another 2019 (1) NR 206 (HC) 30.

account in the grant or refusal of bail is whether *"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."*

[22] Section 60(4)(c) must be read with section 60(7):

> "*In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-*
>
> *(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;*
>
> *(b) whether the witnesses have already made statements and agreed to testify;*
>
> *(c) whether the investigation against the accused has already been completed;*
>
> *(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;*
>
> *(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;*
>
> *(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;*
>
> *(g) the ease with which evidentiary material could be concealed or destroyed; or*
>
> *(h) any other factor which in the opinion of the court should be taken into account."*

[23] In the present matter, the appellant knows the witnesses' identity; it is his wife and her children. An affidavit from his wife confirmed that she feared the safety of herself and that of her children. In addition, she stated that appellant had previously threatened to kill her and chased her older child with a firearm. The police officer testified that the appellant pointed the firearm at the head of the complainant (his wife) pulled the trigger but it jammed, he then got furious and shot numerous times, shooting her 8 times and his stepson a 6 year old child was shot once. His actions indicate a great degree of aggression towards his wife. Considering the nature of their relationship, I find that he could easily intimidate her and the children. I agree with the submission made by the state that even if the appellant goes to live in Barberton he could easily travel to Secunda where his wife and children live. He has a car, in addition, on the day of the incident he drove to Barberton after the shooting and not to the Secunda police which was close by.

CONCLUSION

[24] With regards to the first ground of appeal that there is no evidence that the appellant if released on bail will evade his trial, this does not appear to be in dispute. In so far as the forth ground of appeal I find that there is no basis laid and nothing to indicate to that the magistrate had insight into the docket resulting in her judgement being clouded. I also find that the fifth ground of appeal is unfounded, there is nothing in the record that indicates that the magistrate over emphasized the seriousness of the allegations and convicted the appellant at the bail proceedings. I am satisfied that there was sufficient evidence on record to show that there is a likelihood that, if released on bail, the appellant may interfere with the witnesses especially in light of the relationship between the parties. The contention that he did not interfere with the witnesses after the incident is without merit as after the shooting, he went to his parental home where after he handed himself over to the police on advice of his father. He has been in custody since then.

[25] I must also consider that there is an onus on the appellant to show that the interest of justice permits his release on bail. He stated that he wanted bail so that he

could return to work and pay the rent and school fees. It is noteworthy that the job he wishes to return is in the area where the complainants reside. I find that he failed to discharge the onus to show on a balance of probabilities that the interest of justice permits his release

[26] In light of all the circumstances as set out above, I am of the view that the magistrate's decision to refuse bail was correct. I am of the view that the appellant has not succeeded in discharging the onus that rested upon him.

[27] It is accordingly ordered as follows:

Order

The appeal is dismissed.

A. Dathoo
Acting Judge of the High Court

For the Appellant:

For the Respondent: **Instructed by:** **Director of Public Prosecutions:**