IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A02/2023

DATE: 31-01-2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

In the matter between

SHAHEED CAJEE Appellant

and

THE STATE Respondent

Neutral Citation: *Shaheed Cajee v The State* (Case No: A A02/2023) [2023] ZAGPJHC 334 (31 January 2023)

J U D G M E N T

KARAM AJ: The appeal in this matter was argued on 26 January 2023. Mr Meiring appeared for the appellant and Ms Moseki represented the state. The Court proceeds to hand down its judgment in this matter.

The appellant applied for bail which was opposed by the state and refused on 14 December 2022. This is an appeal against such refusal of bail. The appellant is charged with one count of murder, the victim being his wife.

It is common cause that this is a Schedule 5 matter, the appellant being required to satisfy the Court that the interests of justice permit his release on bail. Section 60(11)(b) of the Criminal Procedure Act 51 of 1977, provides that, 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 law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that the interests of justice permit his release.

An appeal against the refusal of bail is governed by section 65(4) of the Criminal Procedure Act, which provides and I quote:

> "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 shall have given."

10

The approach of a court hearing a bail appeal is trite. In *S v Barber* 1979 (4) SA 218 (D) at p220 E–H it was stated and I quote:

> "It is well known that the powers of this Court are widely 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
20 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 it 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…"

In *S v Porthen & Others* 2004 (2) SACR 242 (C), in regard to the appeal Court's right to interfere with the discretion of the Court *a quo* in refusing bail, it was stated and I quote:

"When a discretion…is exercised by the Court *a quo*, an Appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first

instance is vested with a discretion and will eschew any inclination to substitute its own decision, unless it is persuaded that the determination of the court or tribunal of first instance was wrong."

This Court is aware that there is no onus on a bail applicant to disclose his defence or to prove his innocence. Further, that the Court hearing the application or this Court of Appeal, is not required to determine in such application or appeal, the guilt or innocence of the applicant-that is the task of the trial court.

No oral evidence was led in this matter and the evidence for and against bail was by means of affidavit.

One of the factors to be considered is the strength of the State's case. It is apparent to this Court that the State indeed, has a strong case against the appellant. In his affidavit in support of his bail application, the appellant states in paragraph 3.6 thereof and I quote:

> "I must accept from the surrounding facts, that I killed the deceased. I am suffering from amnesia induced by alcohol and drugs and do not remember the events leading to her death. I deny that I had the criminal capacity to act at the time of the incident leading to the death of the deceased."

Regarding the appellant's intended plea.

There are at least two aspects not dealt with in the Court *a quo*, which, in this Court's view would appear not to support such plea.

Firstly, it would appear that after the son left the house in order to call for help subsequently to his discovery of his mother's body, the appellant locked the door of the residence resulting in the neighbour, Mr David, having to break down same in order to gain access thereto, shortly thereafter.

Secondly, it would appear that the murder weapon was subsequently found at the bottom of the swimming pool.

Whilst there is no evidence, at this stage in any event, as to the time of death of the deceased, or the effects of the intoxicating substances on the Appellant at the time these aforesaid aspects occurred, these would have appeared to fly in the face of the intended plea.

It is noteworthy that counsel for the Appellant was unable to comment on the latter aspect when same was put to him.

The crime with which the Appellant has been charged is indeed a serious offence. The taking of another's life is the ultimate crime. Further, this is a case of gender-based violence, a crime that has reached epidemic proportions in our country and is viewed in an extremely serious light.

It would further appear that there were at least two occasions, prior to the deceased's demise, that she had instituted proceedings against the appellant alleging violence to herself, and subsequently withdrew same.

I have no doubt that the trial court will deal with the veracity of the details pertaining to same and the withdrawal of same.It is unclear from the papers as to whether the Appellant is charged in this matter in terms of section 51(1) of Act 105 of 1997 or in terms of section 51(2) of the latter Act. Whatever the position, and irrespective of whether the Appellant is ultimately tried in the Regional Court or in the High Court, in the event that he is convicted, he faces long-term imprisonment.

Regarding section 60(4)(c) of the Criminal Procedure Act.

In the bail proceedings, reference was made in paragraph 1.5.3 of the Appellant's affidavit to his and the deceased's three children. No reference was made to where the eldest son resides. Further, no reference was made to the names of the children. In the affidavit of the investigating officer opposing bail, reference was made to the son Ameer, who saw the appellant with bloodstained clothing and discovered the body of the deceased.In argument, this Court was advised that Ameer is the eldest child, and that he lived with his parents from time to time. There is no evidence as to where and with whom he resides, and the evidence presented was noticeably vague regarding this son.

It is highly doubtful that were the appellant to be granted bail, he would not come into contact with his son, a material State witness, and there is an overwhelming probability that this son would, not necessarily be intimidated or interfered with, but certainly be pressurised or influenced in one way or another in relation to the testimony he is to adduce, also given his young age.

It would be unrealistic to expect that this may not occur, especially when the Appellant is released from the Rehabilitation Centre and resides with his parents, as proposed.

Attached to the State's heads of argument in this appeal, was a letter from the Rehabilitation Centre where it is proposed in the bail application that the Appellant be referred for treatment of his drug addiction. The letter reveals that the Appellant has previously been treated there, for different periods of time, on five occasions.

During the hearing of this appeal, this Court afforded the Appellant's counsel an opportunity to address this, and was amenable to adjourning and even postponing the matter for this purpose, as, having perused the State's heads, the Court could not ignore what it had read. Counsel declined the opportunity, submitting that it was irregular for the State to have included the letter and urged the Court not to consider same in the determination of this appeal.

Whilst the Court is in agreement that it ought not have been included in the State's heads, this Court wishes to emphasise the fact that its decision in this appeal would have been the same, irrespective of the letter, and its determination of the appeal has in no matter been affected or influenced thereby. Whilst several of the criticisms levelled at the judgment of the Court *a quo* have merit, these are not material to the extent that it can be said that the learned Magistrate exercised her discretion wrongly.

This Court finds that the ultimate decision of the learned Magistrate to refuse bail is correct and accords with justice.

The meaning of the term "interest of justice" has been set out in multiple decisions of multiple courts, including the Constitutional Court. What is clear is that the term refers to a multiplicity of factors and is not restricted or confined to only those interests of an accused person.

Counsel for the State has advised the Court that the State's investigations will be completed in some two weeks. It is certainly not in the interest of justice that the trial be delayed for a period of six months to a year, whilst the appellant receives his treatment at the Rehabilitation Centre as proposed. To do so, would be to cater to the sole and exclusive interests of the Appellant. Whilst it may be inconvenient for the defence to prepare its case, whilst the Appellant is incarcerated, this is certainly not a reason for bail to be granted.

There is further no evidence that the Appellant will not receive the appropriate treatment for his addiction whilst incarcerated. Whilst it may not compare to private treatment in a Rehabilitation Centre, this too is not a reason for bail to be granted. Again, to grant bail for these reasons would be in the exclusive interests of the Appellant.

In light of all of the aforegoing, this Court is of the view that the learned Magistrate's decision that it was not in the interest of justice to grant bail, was correct.

Accordingly, the appeal is dismissed.

……

KARAM AJ

JUDGE OF THE HIGH COURT

DATE OF HEARING: 26 JANUARY 2023

DATE OF JUDGMENT: 31 JANUARY 2023

ATTORNEYS FOR THE APPELLANT: BDK ATTORNEYS

COUNSEL FOR APPELLANT: ADVOCATE MEIRING

COUNSEL FOR THE RESPONDENT: ADVOCATE MOSEKI