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

Appeal No.:A49/2023

DPP Ref No:10/2/5/2/-2023/025

Date of hearing: 12 May 2023

Date delivered: 19 May 2023

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
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In the matter between:

PERES, JORGE MICHEL FERREIRA

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Peres, Jorge Michel Ferreira.* (Case No: A49/2023) [2023] ZAGP JHC 634

(19 MAY 2023)

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appeal in this matter was argued on 12 May 2023. Mr Sithole appeared for the appellant and Ms Kowlas represented the State.

   The appellant applied for bail which was opposed by the State and refused on 1 December 2022. A further application for bail on new facts was brought, also opposed, and refused on 7 February 2023. This is an appeal against such refusal of bail.

THE APPROACH OF A COURT OF APPEAL

2. An appeal against the refusal of bail is governed by **section 65(4) of the Criminal Procedure Act 51 of 1977**, hereinafter referred to as the ("CPA") 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."

The wording of **Section 65(4)** is couched in peremptory terms and the intention of the Legislature expressed in such section is clear. See also in this regard what is expressed in **S v Barber 1979 (4) SA 218 (D)** at page 220 E - H where 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 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…"

3. 3. In ***S vs Porthen and Others*** **2004(2) SACR 242(C)**, in regard
4. to the appeal Court's right to interfere with the discretion of
5. 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".

THE APPLICATIONS

4. No oral evidence was led in the applications and the evidence was presented by means of affidavit.

The notice of appeal and heads of argument outline the submissions of the appellant and the Court is not going to unduly burden this judgment by reiterating same. The appellant is charged with the murder of his wife.

It is common cause that the offence with which the appellant has been charged

is a Schedule 5 offence.

5. In terms of **Section 60 (11) (b)** of the CPA, 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 or her release.

6. In the first application, it was stated in the appellant's affidavit, inter alia, that he is in possession of a South African passport which has expired; that his mother lives in Portugal; that he does not have financial and business interests outside the Republic of South Africa or any assets outside South Africa; that his incarceration will be prejudicial to the conduct of his defence; that his ill-health requires him to consult his regular doctors; that his business will suffer by his continued incarceration and that he requires to maintain contact with his sons with whom he has always had a close bond.

    6.1 As regard the offence, he stated that he has no proper recollection of how he ended up in the hospital ward; that he is not in a mental or emotional state to provide an informed decision as to how he will plead, and that he is not a person who is disposed to violence.

    6.2 The investigating officer, in opposing this application, stated in his affidavit, inter alia, that police officers who attended the scene were

advised by two women, one of whom was the deceased's sister, that it was the appellant who had beaten and stabbed the deceased and that the appellant was in the bathroom. Upon investigation, the officers discovered that the appellant had jumped through the bathroom window and whilst searching the complex, found the appellant hiding on top of the electrical box and he had blood on his clothing. He was hiding from the police but was arrested. He had injuries on his body and white foam emanating from his mouth. It was further stated in his affidavit that the appellant was also a citizen of Portugal and had property outside the Republic.

6.3 The statement of the deceased's sister, Charmaine, was to the effect that the deceased had requested their mother to come to the deceased's residence as the appellant had stabbed and assaulted her. The deceased's mother called Charmaine who, upon fetching her mother, drove to the deceased's residence. They encountered security officers there, who had broken the security gate. They instructed the security officers to also break open the main door to the house, and upon doing so, they discovered the deceased's body. Upon the arrival of the police, Charmaine requested them to arrest the appellant, who was still at that stage in the residence. However, the appellant had disappeared after jumping out of the window.

6.4 Upon questioning by the learned Magistrate, the appellant confirmed that he has dual citizenship of South African and Portugal. Upon further questioning by the learned Magistrate, as to the expiry of his South African passport, his counsel then requested to approach the appellant and advised the Court that his South African passport has expired, that his Portuguese passport expired many years ago, and that although he possesses Portuguese's citizenship, he has not been to Portugal for the past 20 years.

6.5 The security officer's statement is to the effect that on 24 November 2022 at around 00h30, he received a complaint of a woman screaming. Upon his arrival at the residence with a colleague, he encountered a neighbour and an off-duty police officer. At the instance of the latter officer, he and latter officer broke the security gate. The mother of the victim and her daughter then arrived and gave them permission to break open the door to the residence, which was locked. Upon entering the residence, they discovered the victim lying on the floor.

The State then further handed in, by consent, an affidavit by the son of the appellant and the deceased, opposing the release of the appellant on bail. The learned Magistrate then afforded the appellant's counsel an opportunity to adduce further evidence relating to the latter affidavit of the appellant's

son. Counsel for the appellant advised the Court that the defence does not rebut the contents of same and wished to proceed to argue the matter.

6.6 In short, and inter alia, the affidavit of the son points to a history of the deceased having been abused by the appellant both physically and verbally; cellular telephone messages of the deceased to family members from the evening 23 November 2022 to the early hours of 24 November 2022 wherein she stated that the appellant is physically abusing her and later that he has stabbed her; further that he had jumped out of the window, six metres above the ground and was subsequently found hiding on top of the electrical transformer; further that he and family members are fearful of the appellant and for their safety, should he be released on bail. The affidavit is confirmed by various members of the deceased's family, including the younger son of the appellant and the deceased.

7. Given the above, as well as the fact that the appellant is a man of considerable means, I am of the view that the Court a quo was fully justified and correct in its refusal of bail. In his judgment in the first application, no reference was made to the strengths of the State's case. I will revert thereto later in this judgment.

8. In the application on new facts, the appellant avers, inter alia, that the Tembisa hospital records indicate that he was admitted to hospital shortly after his arrest with

severe hypoglycaemia.The medical report of Dr Eastman reflects that symptoms thereof include confusion.

8.1 His conduct of exiting the bathroom window and climbing on top of the electrical box should not be construed as an attempt to abscond. If he had wanted to, he could have walked out of the complex and/or exited same with his motor vehicle.

8.2 Further, that as he was married to the deceased in community of property, his originally stated value of his estate of R13 million is significantly less, and he has no access to his share thereof, until the executor of the deceased's estate finalizes same.

8.3 That contrary to his sons' averments that they fear him, his sons visited him in hospital on 28 November 2022 and on 12 and 14 December 2022 at prison.

8.4 That the opposition by his sons, to his being granted bail was motivated by perceived financial gain.

8.5 That the prison does not have his required medication, which resulted in him being hospitalized on 2 December 2022 and his brother being required to supply same. He requires his brother to purchase and provide him with his required medication on a monthly basis.

9. The state again opposed this application on new facts. An affidavit by the appellant's son was used in support thereof.

10. In his judgment refusing bail, the learned Magistrate again made no reference to the strengths or otherwise of the State's case. I will deal with same hereinunder.

11. The thrust of the appellant's argument is that his medical condition resulted in him becoming confused to the extent that he is unable to recall or explain how he exited the bathroom window and came to be found on top of the electrical box and that this was not an attempt to abscond.

    11.1 Further, that his frail state and then state of mind resulted in his failure to advise his legal representative of his dual citizenship.

    11.2 That he has not travelled to Portugal for the past 10 years.

    11.3 That he has since discovered that his Portuguese passport has not expired and is valid until 2025.

    11.4 That he and the deceased own an apartment in Portugal which is rented out. The failure to mention same is also attributed to his then state of mind.

    11.5 Regarding his alleged confusion, it is important to note the following:

- Dr Eastman's report expresses the view that the severe hypoglycaemic event was most likely caused by an accidental or intentional overdose of insulin.

- His report further states that the symptoms of hypoglycaemia can include confusion.
- His report further states that the clinical notes of the Tembisa hospital indicate that in all the assessments, the appellant was not confused.

12 Accordingly, the report of Dr Eastman, provided in support of the bail application on new facts, certainty does not support the appellant's averments as to his alleged confusion.

12.1 Dr Eastman is a general practitioner, and there is no evidence of a diabetic specialist to the effect that a person suffering from a severe hypoglycaemic event would conduct himself in the manner in which the appellant did.

13 The appellant's son, in his affidavit, opposing the bail application on new facts, states that when the appellant escaped arrest and when he and his brother visited the appellant at the Tembisa hospital on 28 November 2022, the appellant was fully compos mentis.

13.1 Further, that the appellant was fully in his sound and sober senses when escaping through the window and concealing himself for some 2 hours whilst the police and security guards were searching for him in the complex.

13.2 Further, that as a small crowd of neighbours, emergency service

providers and security had gathered at the scene, the appellant would not have been able to leave or take his vehicle and exit the complex as he would have been seen and apprehended. Further, that the appellant consciously decided to climb onto the electrical box, a 100 metres away, and lie down thereon in order to remain undetected.

14 It is further significant that the learned magistrate stated in his judgment that the appellant appeared quiet normal to him at the first bail hearing, and that if there was anything that alerted him to the appellant not being in his full senses, he would not have continued dealing with the application.

15 There is further no allegation by the appellant's legal representative that the appellant had demonstrated any sign of confusion in his consultation/s with him. Accordingly, it appears highly improbable in the circumstances, that the appellant, having consulted with his counsel, having read and had his affidavit commissioned, and further having had same read out in court, would not be aware or recall, at the very least, that he has citizenship of Portugal and that he owns a property there, from which he is in receipt of a rental.

It appears that the appellant was forced to admit to this as a result of his son's affidavit opposing his bail, which makes reference thereto. Interestingly, his son makes reference to the appellant having numerous property interests in Portugal, from which income is derived.

16 It is further significant that the appellant instructed his counsel in the first bail application, to tell the court that he has not travelled to Portugal for the past 20 years, whereas, in the subsequent application on new facts, the allegation is made that he has not travelled to Portugal for the past 10 years.

17 The aforesaid factors, coupled with the independent medical evidence that there was no confusion, leads to the irresistible conclusion that the appellant was wilful in his failure to inform the Court of relevant information and further, that he in fact, wilfully, attempted to evade arrest on the night in question. Accordingly, this Court is in full agreement with the learned Magistrate's finding that the appellant may well be a flight risk.

18 The crime with which the appellant has been charged with is indeed a serious offence. The taking of a 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 viewed in an extremely serious light.

19 What is construed as the "interests 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.

20 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.

21 There is further no evidence, other than the one incident that the appellant avers that his mediation was stolen in the holding cells and that the prison was not able to provide him with his required medication and he suffered a medical setback as a result, that he has been medically prejudiced by his incarceration.

This incident happened some 5 months ago. Furthermore, the appellant remains on his medical aid, and the required medication is delivered to him by his brother. The appellant's son has also undertaken to do so, if required. Counsel for the State has advised the Court that there have been no further complaints by the appellant in this regard in his subsequent court appearances.

22 In argument before this Court, counsel for the appellant referred the Court to the decision of **S v Vanqa 2000 (2) SACR 371 (TK).** In short, the facts of that decision are vastly different from the current matter.

In that matter, the appellant, an asthma sufferer, had been denied medication from the prison authorities. He was further denied medication brought to the prison by his family. Upon his request to prison authorities to be taken to a doctor, he was refused, the prison authorities stating that he was to be taken to the doctor by the investigating officer.

23. This Court is in agreement with the learned Magistrate's view that the bail application on new facts amounted to a reshuffling of the old factors and that the only new factor was the medical incident aforesaid.

24. There is further no merit in the allegations that he will be prejudiced in his business dealings. The appellant is essentially retired and the receipt of the rentals from the properties he owns, can be undertaken by the executor of the deceased's estate and/or the appellant's brother.

25. Counsel for the State has advised the Court the State is ready to proceed to trial. Further that the postponement on 21 April 2023 was occasioned by the appellant having terminated the mandate of his erstwhile legal representative and his request for a postponement to 7 June 2023.

    Counsel for the appellant advised the Court that his office has only been instructed in respect of this appeal.

    Accordingly, it would appear that this is not a matter where extensive investigations are ongoing and that the appellant will languish for months or years pending same. On the contrary, the State is ready to proceed to trial and any delay in this regard is occasioned by the appellant.

26. This Court is aware that there is no onus on a bail appellant 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.

27. 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.

The cellular telephone messages from the deceased to her mother of the appellant having stabbed her; the alleged confessions of the appellant to his sons and the deceased's family that he indeed committed the offence;

The fact that the doors to the residence were locked and the lack of evidence that there was anybody be in the residence other than the appellant and the deceased;

The lack of any denial by the appellant in both applications, that he did in fact murder the deceased.

28. The appellant is currently charged with murder read with the provisions of **section 51(2) of the Criminal Law Amendment act 105 of 1997**, hereinafter referred to as the minimum sentence legislation.

Accordingly, should he be convicted he is facing a minimum sentence of 15 years imprisonment.

Counsel for the State advised this Court that there is a possibility that the matter will be transferred to the High Court for trial and that the indictment may be amended to murder read with the provisions of **Section 51(1)** of the minimum sentence legislation, in which event the appellant faces life imprisonment should be convicted.

29. In light of all of the foregoing, this Court is of the view that the learned Magistrate's decision that it is not in the interests of justice to grant bail, on the application on new facts, is correct.

The finding of this Court is that there are no grounds to interfere with the decision of the Court a quo.

In the premises, this Court makes the following order:

ORDER

The appeal against the refusal of bail in respect of both the initial application and the application on new facts, is dismissed.

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WA KARAM

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Appearances:

APPELLANT: Adv E Sithole

Instructed by Edward Sithole and Associates Attorneys

RESPONDENT: Adv N Kowlas

Director of Public Prosecutions

Gauteng Local Division