



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 10022/2023P

In the matter between:

KHULEKANI KHANYILE

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Mzinyathi Magistrate's court, Msinga (H N Zondo sitting as court of first instance):

- 1. The appeal is dismissed.**

BAIL APPEAL JUDGMENT

Delivered on:

Mngadi J

- [1] The appellant appeals against the decision of the Msinga Magistrate's court (Ms Zondo) refusing an application for the release of the appellant on bail pending trial.
- [2] The appellant, an adult male aged 31 years, was arrested on 7 November 2022 on a charge of murder read with the provisions of section 51 (1) part 1 of schedule 2 of Act 105 of 1997 and with Attempted murder committed on 8 September 2022. Other two charges he was charged with were a contravention of s 120 (7) of the Firearms Control Act 60 of 2000 to wit discharging a firearm in a built-up area, and a charge of pointing a firearm.
- [3] The charge of attempted murder was alleged to have been committed during the same time as the charge of murder. The charge of discharging firearm in a built-up area and the charge of pointing a firearm were allegedly committed on 17 October 2021. These two latter charges, in my view, played or ought to have played no role in the decision not to release the appellant on bail pending trial.

- [4] The magistrate heard the application for the release on bail on 23 November 2022. She in a judgment delivered on 07 January 2023 refused the application for the release of the appellant on bail.
- [5] The magistrate indicated that both the appellant and the state agreed that the application for the release on bail of the appellant fell under the provisions of schedule 6. Section 60(11) (a) of the Criminal Procedure Act 51 of 1977 (the CPA) provides that where the accused is charged with an offence referred to in Schedule 6, the court shall order that the accused be detained in custody unless having been given a reasonable opportunity to do so, he adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release.
- [6] The appellant testified before the magistrate. He did not call any witnesses. He testified as follows: He was 30 years old. He resides at Ezingulubeni at Msinga at his parental home, with his parents, and siblings, having been born in that area. He had five (5) children from different mothers, the oldest child was 3 years old and the youngest was two (2) years old. The mothers of the children received child grant. He was not married but he had a fiancée.
- [7] The appellant testified that he was employed by the Municipality as a contract worker earning R12 000 per month. His contract was for five (5) years. He worked as a security guard for a mayor of Msinga Municipality. The mayor was on suspension. He travelled around with a mayor, opening a door for his motor

vehicle and ensuring that everything was in order. He supported his family and his children.

[8] The appellant testified that he had no previous convictions. He had one pending case against him. The case related to an incident when he was selling in tavern and the police found a firearm and charged him with unlawful possession of a firearm. He was appearing in Johannesburg for that case since 2015. It was once withdrawn and later reinstated. He was arrested at his home. His phones were confiscated. He was taken to the police station. After he was arrested, he attended an I.D parade but his legal representative was not present on the day the I.D parade was held. He had nothing to say relating to the murder and attempted murder charges and in that there are eyewitnesses that saw him at the crime scene committing the crimes. He will not comment that the witnesses who saw him committing the two crimes identified him in the I.D parade. He would not comment that the evidence of the cell phone records of his phone indicate that at the time and date the crimes were committed his cell phone was in the area where the crimes were committed.

[9] The appellant testified that the complainant in the attempted murder charge who is also a witness to the murder charge is known to him, he is councillor Ntuli, a municipal ward councillor, and they worked together in the municipality of Msinga. He stated that he would not interfere with witnesses, and he had never interfered with them. His level of education is matric. He has furnished an alternative address being 230 Copper Stress, Greytown where the mayor who is on suspension whom he guards resides.

[10] The appellant testified that he was building a house in his home that he needed to finish. He did not own a motor vehicle. He did not have a driver's licence. He did not have a licence to possess a firearm. He did not resist arrest and he co-operated with the police. He had some training as a security guard. He testified that for the crimes committed on 8 September 2022, he had an alibi. He between 11h00 and 12h00 was at a tuckshop. He had witnesses to support his alibi, namely, his father and one Malema. He testified that he was present in the funeral of the deceased in the murder charge. The deceased was also a councillor of the Msinga municipality. He confirmed that on 8 September 2022 he had at all times his cell phone on him. He had two cell phones. At some stage he did a sim swap, he was not certain whether it was after or before the councillor, the deceased in the murder charge died. His brother who did a sim swap for him has since passed on.

[11] The appellant testified that tuckshop in which he was, and the scene of the crimes committed on 8 September 2022 is near Ndabankulu Primary and Sakhiseni School, located in kwaMabaso in the area of Enyadu. He stated that at the funeral of the deceased the person who said he saw the perpetrators did not mention his name.

[12] The appellant testified that he would like to go back to guard the mayor. The mayor although not working from the office still attend other work. He also wanted to attend to the building of his house and to be with his family. He gave the names of his children as [K....], [V....], [L....], [S....] and [M....]. He disputed

that the police officers at Msinga Police Station were scarred of him. He said they had arrested him before.

[13] The state lead evidence of one witness, the investigating officer, Sergeant Mokoena. Sgt Mokoena testified and he submitted his affidavit. He stated that he had fifteen (15) years' service as a detective in the South African Police Service. He stated that the murder and attempted murder charges the appellant is facing relate to an incident which took place on 8 September 2022 at about 11h33. He said that councillor Magubane was driving his motor vehicle with councillor Ntuli as a passenger. They were driving to Tugela Ferry to attend a mayoral function in the area of Majozi at Pomeroy. They were driving along the R33 main road. At Nyadu area where the motor vehicle had to drive slowly opposite a school they were shot at with a rifle. The shooter was in a motor vehicle which drove along their vehicle. Councillor Magubane was fatally shot and died at the scene. Councillor Ntuli sustained minor injuries on his head, and he was taken to hospital for medical treatment. The assailants' motor vehicle then made a u-turn in front of the deceased vehicle, picked up one assailant who had alighted, and it drove away.

[14] Sgt Mokoena gave evidence relating to what happened on 17 October 2021 which pertained to the other charges. It is not necessary, in my view, for purposes of this appeal to summarize that evidence. Sgt Mokoena stated that both incidents were politically motivated. He said that the witnesses who attended an I.D parade, they pointed out the appellant. The said that the cell

phone records of the appellant relating to the murder and attempted murder charges placed him at the scene of the incident.

[15] Sgt Mokoena testified that he verified that the appellant was employed by Msinga Municipality. The appellant had a pending case as at Primrose in Germiston for unlawful possession of a firearm. He said that from the past conduct of the appellant, it is likely that if released on bail he will commit a schedule 1 offence. He found that the appellant's mother and father knew of only one child of the appellant. He said the state has the strong case against the appellant, in that the appellant is linked to the crime scene by eyewitnesses who pointed him out in the identification parade and also through the cell phone records. The appellant is facing very serious charges. If convicted he could be sentenced to a lengthy period of imprisonment. He said this may cause the appellant to evade trial, and or interfere with witnesses if released on bail. The witnesses are very fearful of the appellant. The appellant can find out of who are the witnesses and their places of residence. The witnesses are from Msinga area. The appellant is a well-known person in the area, and he is regarded as a dangerous person. The witness who survived the shooting lives in fear of being killed. The ballistic evidence established that two firearms were used during the attack, namely, a rifle and a pistol.

[16] Sgt Mokoena testified that the firearms used during the attack have not yet been recovered. There are also outstanding suspects. The offence caused shock and anger in the community. The offences attracted widespread media

attention. The appellant's life if released on bail is not guaranteed from those aggrieved by the attack.

[17] Sgt Mokoena testified that the deceased was the chairperson of the municipalities' public account's committee. There were irregular and unauthorized expenditure in the municipality being investigated by the committee. The investigation related to the involvement of other councillors of the municipality. The fact that the deceased and his passenger were followed and attacked whereon they had to drive slowly and that nothing was taken from them during the attack indicates that it was an assassination.

[18] Sgt Mokoena testified that the appellant was not the sole breadwinner of his family. His father operated a taxi business and he conducted livestock farming. During the adjournment he investigated, and he interviewed the mothers of the children named by the appellant and he also obtained copies of the birth certificates, and only one child was found to be the appellant's child. He also learnt from the Human Resources manager at the municipality that the suspended mayor has resigned. The resignation of the mayor meant that the employment contract of the appellant is terminated. He also found that the appellant was not registered with PRISA as a security guard. He conceded that although the mayor resigned, he is still recognized as a councillor. The appellant may be given other job within the municipality. He conceded that there was nothing in writing in the docket indicating that Msinga police officers are afraid of the appellant.

[19] Sgt Mokoena testified that the witnesses relating to the murder charge that identified the appellant in the I.D Parade are not known to the appellant. He confirmed that during the funeral of the deceased councillor Ntuli mentioned one person within the municipality, involved in their attack, the name of the appellant was not mentioned. He did not know whether the outstanding suspects knew Mr Ntuli or not. He stated that with the evidence that exists the appellant can be prosecuted. He said he could not dispute that the appellant's father had two wives and two homesteads, and nine siblings. He said it is correct that the mayor who resigned has advised that all his security guards employment contracts have been terminated, but he could not dispute that a private company may employ those who were guarding the mayor to continue doing so as its employees. He said he could not dispute that councillor Ntuli has been provided with security guards by the municipality.

[20] It is trite that section 60(11) (a) of the CPA places an onus to be discharged on the balance of probabilities, to show that exceptional circumstances exist which in the interest of justice permit the release of the applicant on bail. A bail application under s 60(11) (a) of the CPA is more invasive of the accused person's liberty right than that falling under the provisions of s 60(10) (b) of the CPA. The presiding officer bears in mind on the one hand the fundamentals for the release of an accused on bail and on the other hand the requirements to be satisfied for the release on bail in a matter falling under s 60(11) (a) of the CPA. The presiding officer, in particular, bears in mind that the accused has not been tried, he is presumed innocent until found guilty and that liberty of a person is highly valued by the constitution. The accused person cannot

arbitrarily be deprived of his freedom. There must always be good cogent grounds for a refusal to release on bail an accused person pending trial. The legislature for the crimes falling under schedule 6 requires that a stricter approach be exercised in applications for release on bail. In other words, in such bail applications, the like hood of fleeing not attending trial, like hood of interfering with investigation and or witnesses, the release on bail undermining administration of justice are taken to exist, and it is for the applicant on a balance of probabilities to satisfy the court that such risks do not exist. In *S v Dlamini et al* 1999(2) SACR 51 (CC) para 65 the court held:

'This view is strengthened by a consideration of s 60(11)(b). That subsection stipulates that an accused must satisfy a magistrate that the 'interests of justices' permit his or her release. It clearly places an onus upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in ss 60((4)-(9) or required by s 35(1)(f). It is clear that an accused on a Sch5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant. The additional requirement of 'exceptional circumstances' imposed by s 60(11)(a) is absent. A bail application under s 60(11)(a) is more gravely invasive of the accused person's liberty right than under s 60(11)(b). To the extent, therefore, that the test for bail established by s 60(11) (a) is more rigorous than that contemplated by s 35(1)(f) of the Constitution, it limits the constitutional right.'

- [21] It is submitted on behalf of the appellant that he has no previous convictions, he has no pending cases, he previously showed respect of the criminal justice and bail system by complying with the bail conditions. It is argued that he testified under oath that he would not interfere with witnesses and/or the investigation.

[22] The learned magistrate stated that the other crimes were committed in the presence of the members of the public. The applicant's behaviour in the commission of these offences is in line with like hood that if released on bail, he will endanger the safety of the public or of other persons, she held. In my view, the learned magistrate misdirected herself in taking it as if the appellant had been convicted of these crimes whereas he had not been tried. It is significant that the other crimes were committed in 2021 and no urgency was shown in arresting the perpetrator. In any case, there crimes did not fall under schedule 6. It is also argued that the behaviour of Malema contacting state witnesses to negotiate withdrawing of the charges relating to the other crimes is an indication that if the appellant is released on bail he will interfere with witnesses. In my view, the possibility that Malema acted on his own without the knowledge of the appellant was not negated.

[23] The learned magistrate regarded the fact that firearms used in the commission of crimes had not been recovered as evidence for a like hood to conceal or destroy evidence by the appellant. In my view, there was no evidence that the appellant was playing any part in the police failing to recover the firearms.

[24] The learned magistrate held it against the appellant that he testified under oath that he had five (5) children which was shown to be lies. In my view, this was held correctly to have affected negatively the credibility of the appellant, but I don't think it can be regarded as act of undermining the system of justice.

- [25] It is, in my view, significant that the appellant is currently unemployed. His incarceration is not depriving him of any income. Potential employers are not likely to take him whilst he is facing the criminal charges currently pending against him. His inability to contribute to the maintenance of his family is not as a result of his incarceration but it is as a result of being unemployed.
- [26] The appellant with no employment has nothing that he is committed to. He has no immovable assets, and he has no family home except his parental home. He is knowledgeable about living away from Msinga as he previously lived in Johannesburg. It is correct that the appellant was not shown to have previously failed to comply with the conditions for release on bail, but at stage he faced a charge which was far less serious than the charge he is facing now.
- [27] As it stands, the legislature has provided that persons who commit murder in the manner the murder in the charge of murder was committed are likely to flee and avoid trial, are likely to interfere with witnesses, and are likely to interfere with investigations, are likely to commit other crimes and their release on bail is likely to undermine the functioning of the administration of justice. The appellant, despite having been given an opportunity to do so, has not succeed to show in the balance of probabilities that exceptional circumstances exist which in the interest of justice permit his release on bail pending trial.
- [28] The appeal against the refusal of the bail application on 27 January 2023 falls to be dismissed.

[29] It is ordered as follows:

1. The appeal is dismissed



Mngadi J

APPEARANCES

Case Number : 10022/22P

For the Appellant : D. Barnard

Instructed by : Kunene Attorneys
PIETERMARITZBURG

For Respondent : LDD Zondi

Instructed by : Deputy Director of Public Prosecutions
PIETERMARITZBURG

Date of Hearing : 4 August 2023

Date of Judgment :