

SOUTH AFRICA / JUDGMENT

Mahungela v S (A48-2024) [2024] ZAGPJHC 581 (19 June 2024)

[2024] ZAGPJHC 581**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

A48/2024

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Source record**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH****AFRICA****GAUTENG DIVISION, JOHANNESBURG****1.****REPORTABLE:**

YES/NO

2.

OF

INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED

YES/NO

19

June 2024

Case

No.: A48/2024

In the matter between:

BAFANA

MAHUNGELA

Appellant

and

THE

STATE

Respondent

JUDGMENT

Strydom J

- [1] This is a bail appeal brought by the appellant against the refusal of bail by the Regional Court Magistrate, Ms. Prinsloo, (the learned magistrate), sitting in the Alexandra Regional Court
- [2] This appeal is brought in terms of s 65(4) of the Criminal Procedure Act 51 of 1977 (the CPA). This section provides that this Court shall not set aside the decision against which the appeal is brought, unless this Court is satisfied that the decision was wrong, in which event this Court shall give the decision which in its opinion the lower court should have given.
- [3] In its consideration of the learned magistrate's decision the Court will consider whether the learned magistrate misdirected herself on a material aspect. This exercise will include an enquiry whether the learned magistrate gave due regard to the constitutional norms pertaining to accused and arrested persons, to wit, to be presumed innocent (s 35(3)(h)) and to be released from detention if the interests of justice so permits (s 35(1)(f)). The Court in its assessment whether the learned magistrate was wrong will have due regard that the refusal of bail goes to the question of deprivation of personal liberty. The matter should be approached from the perspective that freedom is a precious right protected by the Constitution. (See: *S v Branco* 2002 (1) SACR 531 (W) 532 I-J; *S v Porthen & Others* 2004 (2) SACR 242 (C) at para [17]). Even should it be found that the learned magistrate misdirected herself on a certain finding, this would not necessarily mean that bail should be granted. This Court will then assess the matter afresh and determine whether bail should be granted, and if so, with or without bail conditions.
- [4] In this matter the appellant is facing a count of murder, read with the provisions of s 51(1) of the General Law Amendment Act 105 of 1997 (the Amendment Act), a count of robbery with aggravating circumstances and a count of rape.
- [5] The court a quo found that having regard to the counts the appellant are charged with, the bail application is one that resorts under s 60(11)(a) of the CPA which provides that the court shall order that an accused applying for bail shall not be granted bail, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exists which in the interest of justice permitted his release.
- [6] In my view, the learned magistrate was correct in her finding that the bail application of the appellant resorted under s 60 (11)(a) of the CPA as the appellant was charged with murder together with robbery with aggravation circumstances. S 51(1) of the Amendment Act, which prescribes a minimum sentence of imprisonment for life upon conviction, refers to Schedule 2 Part I, which includes murder, when the death of the victim was caused by the accused in committing robbery with aggravating circumstances. On this aspect alone s 60(11)

(a) is rendered applicable. The learned magistrate's further finding that the murder, on a prima facie basis, was planned and premeditated can, in my view, considering the evidence holistically, also not be faulted. Accordingly, and correctly so, the finding pertaining to the applicability of this section was not challenged in the notice of appeal or in argument before this Court.

- [7] The thrust of the attack against the decision of the learned magistrate is three-fold:
- a. First, the magistrate misdirected herself by finding that the appellant was not entitled to video footage contained in the police docket. It was argued that the court, after the refusal of the prosecutor to provide the appellant with the video footage, should have ruled that this footage should have been presented to the court. Without such evidence the evidence presented by way of affidavit, as to what is contained on the video footage, could not be relied upon.
 - b. Secondly, the attack was aimed against the finding that the appellant failed to establish exceptional circumstances to satisfy the court that he should be released on bail. It was argued that the learned magistrate should have found that exceptional circumstances were established through the viva voce evidence of the appellant, which should bear more weight as the evidence by way of affidavits presented by the State. It was argued that the magistrate wrongly concluded that there was a prima facie case against appellant. It was argued that appellant was not a flight risk.
 - c. Thirdly, that the learned magistrate was wrong in her finding that the appellant is a danger to society.

The evidence

- [8] At the outset of the bail application the prosecutor provided the court with a synopsis of the state's case which was later confirmed by two affidavits handed in as part of the State's case in opposing the bail application of the appellant. The first affidavit was that of the investigation officer, Detective Sergeant Tshisani, setting out that evidence which he obtained thus far and the second affidavit, that of a security specialist, Mr. Grant Moulder, setting out what video footage he could obtain from various Close Circuit Video Recordings.
- [9] The learned magistrate has set out the factual matrix fully and correctly in my view. For purposes of this judgment, I will only briefly restate relevant facts, most of which at the end of the bail application have been shown to be common cause or stood uncontested. I must qualify this statement by noting the argument on behalf of appellant that the court could not rely on evidence relating to what allegedly appears on video footage. Instead, the learned magistrate should have ordered that the video footage itself should be presented to court in the bail application or at least should have been provided to the appellant. The court should not have received photos in lieu of the video footage into evidence. I will deal with this aspect separately in this judgment.

- [10] On 29 October 2023 the deceased went jogging in an event held at the George Lee Park, Sandton ('the Park'). At about 8h04 she was captured on video when she started her third round of this running track wearing a blue t-shirt, black ski pants, running shoes, sunglasses and a cap. She had her cell phone with her with earphones and a watch. At about 8h18 her cell phone was found lying close to the running track and shortly thereafter her naked dead body was found in a ditch next to a wall. Later the postmortem report revealed that the cause of death was blunt force head trauma, strangulation, and that smothering or pressure to the neck could not be excluded.
- [11] The peculiar circumstances under which the deceased died led to a further investigation of the footage of several close circuit video cameras in the Park as well as the wider surrounding area. The witness who gathered the video footage is the witness, Mr. Moulder, whose affidavit was handed in as part as the case for the State. This video footage, according to the affidavit, showed a person, later identified as the appellant, coming into the Park around 8h06. He was wearing, inter alia, a black t-shirt. At about 8h49 the appellant was captured on video walking whilst wearing a blue t-shirt of the deceased with certain items rolled up in his hands. At about 8h52 the appellant was seen scaling a closed gate which led to the outside the Park. He was wearing the blue t-shirt, and he threw items over the gate. He was again seen on the video footage wearing a light blue t-shirt and sunglasses and still carrying the items. Further video footage has shown that the person wearing the blue t-shirt disposed of a cap and other clothing items into a drain. He even went back to see if the items were visible from the road. The cap was later retrieved from the drain.
- [12] This evidence was not contested by the appellant when he testified. In fact, he agreed with the conclusions of the Investigation Officer and Mr. Moulder that the clothing items he carried and later disposed of in the drain were that of the deceased. He agreed that he took the cap of deceased and took off his black shirt and put on the blue t-shirt of deceased.
- [13] The appellant during his bail application did not dispute the evidence contained in the affidavits or various photos which were used during his testimony. His version was rather to explain his movements and why he acted as he did. In brief, he denied killing the deceased. He testified that he got lost and ended up in the Park. At some stage, just after he went to look at the restaurant, he wanted to relieve himself and walk down an embankment. There he saw something strange in a rag. On further investigation he saw a woman lying on her side. It became common cause this was the body of Kristen Kluyts, the deceased in this matter. He was not

certain whether she was still alive and rolled her over. He felt for her pulse but there was none. He saw her neck was swollen. He realised that she was dead but thought that his fingerprints could have been left on her clothing since he touched her. Given the sensitive racial dynamics in South Africa he decided to distance himself from his finding of a dead body to avoid a suspicion aimed at him. He made no alarm but proceeded to undress the deceased to avoid the lifting of fingerprints from her clothing implicating him in her death. He admitted wearing her t-shirt but failed to provide an explanation for this. He admitted disposing the clothing items of deceased

but denied taking her watch and dark glasses.

Grounds of appeal

[14] I will now deal with the ground of appeal which relates to the video footages contained in the docket which was not provided to the appellant.

[15] The starting point is what is provided for in s 60(14) of the CPA. This section provides a follows:

"(14) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial."

[16] S 60(3) also requires reference:

"(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court."

[17] It is undoubtedly so that the onus placed on an accused seeking bail under s 60(11)(a) creates a heavy burden. This was found as such in the constitutional challenge against this section. The Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*

[1999] ZACC 8; 1999 (2) SACR 51 found this section to limit the rights enshrined in s 35(1)(f) of the Constitution but found that it was a limitation which is reasonable and justifiable in terms of s 36 of the Constitution. The court found as part of its reasoning why the limitation is reasonable and justifiable in paragraph 80 as follows:

"[80] But it was argued that the subsection imposes an onus which is so difficult to discharge that the right to release on bail is illusory. In practice, so it was submitted, the accused would face an impossible hurdle: the onus is on the accused to prove the exceptional circumstances; so is the duty to begin; evidence has to be adduced, but an accused, with no knowledge of the prosecution case, cannot hope to discharge the onus in the dark. If that were indeed what the subsection demanded, the contention would probably have been well founded. However, the argument overlooks the important qualification built into sub-s (11)(a) that the accused must be "given a reasonable opportunity" to establish what the subsection requires. The lawgiver did not specify how that is to be done, nor what would be necessary to qualify as "reasonable". This much is clear, however: an opportunity has to be afforded and it has to be reasonable; and it has to be reasonable having regard to the limits that the subsection places on the category of arrestees concerned. They are indeed faced with an uphill battle, and they have to be given a fair chance, e.g. by ordering the prosecutor to furnish sufficient details of the charge(s) to enable the applicant to show why the circumstances are exceptional. Freedom is a precious right protected by the

Constitution, that is why the subsection specifically requires that sch 6 arrestees facing the more formidable hurdle of sub-s (11)(a) be afforded this opportunity.

The requirement of reasonableness is peremptory, though the subsection does not spell out what that means. Nor need it do

so. What is or is not a reasonable opportunity must depend upon the facts of each particular case. But no accused can ever be lawfully confronted with the dilemma postulated - the presiding judicial officer would be failing in his or her duty were that to be permitted to happen. In this context it would be salutary to note the clear exposition by Schutz JA in *Naude and Another v Fraser*:

“It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces.”

The principle is clearly applicable where an accused must try to make out a case under s 60(11)(a).”

- [18] The Constitutional Court gave a clear direction that despite the terms of s 60(14) of the CPA there will be cases where information, a record or a document contained in a police docket should be provided to an accused in bail proceedings to enable an accused to be apprised of the case which he faces.
- [19] The question which should be answered is whether the appellant was unfairly deprived, either by the learned magistrate or by the prosecutor, of an opportunity to be apprised of the case he faces and to adduce evidence to establish exceptional circumstances? To enquire into this, reference should be made to what happened during the bail application. Counsel appearing on behalf of the appellant approached the prosecutor to obtain the video footages and postmortem report. The latter was later provided but not the

video footage. The prosecutor relied on s 60(14) to refuse to make available the video footage. What the prosecutor, however, stated is that the state will not show the videos in court but would use photographs obtained from the footage. These photos were used in court and admitted into evidence by the court without objection.

- [20] The record of proceedings show that Mr. Masako, on behalf of appellant, raised this issue pertaining to the making available of video footage in court and referred the court to the matter of *R Green and Another v The State*

- [2006] SCA 3 (RSA) (*S v Green*). He informed the court that instead of the video footage the State indicated that it would use photographs. It was, according to Mr. Masako, agreed in principle that the prosecutor would have provided him with the photographs. He then asked the court to ensure that he obtains the photographs. Mr. Masako then placed on record as follows and I quote: “As to the authority of *S v Green*, it becomes irrelevant because the video is not going to be used. We will be wasting the court’s time arguing about that.” Mr. Masako then placed on record that he has received the photos.

- [21] Considering this, it is clear that the appellant, through his legal representative, never applied to court to obtain the video footage. If anything is to be concluded from what was said on record, it will be that Mr. Masako was satisfied to proceed with the bail application without receiving the video footage considering that the photos were provided. This in my view, is one of the distinguishing factors between this matter and *S v Green*. In that matter there was a substantial application to have access to the closed-circuit television tapes and evidence of fingerprints. The state opposed the application, and the application was dismissed by the court. The court then relied on the evidence of the state witnesses' evidence as to what was contained on the video footages. It was testified that one applicant was the driver of the get-away vehicle. Actions of the other applicant pointed to his participation in the robbery. The reliability of the state's evidence was seriously challenged by the oral evidence of the applicants. At stake was the strength of the case against the applicants for purposes of a finding whether exceptional circumstances were shown for the release on bail of the applicants. The denial of the two applicants that they participated in the robbery could have been shown to be false if the video footages directly implicated them, alternatively, could have dispelled the allegation that the applicants participated in the robbery. Yet the court found that the video footage should not been provided and that the evidence as to what could be seen of the footage was sufficient to conclude that the State had a case against the accused. On appeal, the court found, with reference to *S v Dlamini supra*, that the video recordings should have been provided and that the court should have invoked the provisions of s 60(3) of the CPA. The decision was based on the fact that the bail court lacked reliable and important information necessary to reach a decision on the strength of the state's case, notwithstanding that such information was apparently readily available. It should be noted that the SCA did not grant the appellants bail pursuant to its finding, but merely referred the matter back to the court a quo to receive the evidence of the video recordings.
- [22] In the matter of the appellant, still photos of that which appears in the video recordings were provided. It was never challenged that these photos were not obtained from the video footage. On the contrary, the appellant admitted that what the photographs depicted. In such circumstances, the appellant was made aware of what evidence is contained in the video footage and he has not been unfairly deprived of an opportunity to adduce evidence to counter the circumstantial evidence, as opposed to direct evidence, which the photographs have established. The evidence by way of affidavits, handed in by the State, does not allege that according to video footage the appellant was seen committing the murder. The reliability of the evidence of the State was augmented by the photographs that depicted what is contained in the video footage. This, in my view, distinguishes the appellant's matter from *S v Green*. The evidence presented by way of affidavits as to what appeared on the video footage was not disputed in material aspects. In my view, the learned magistrate was not left in a position that it did not have reliable or sufficient information or evidence at her disposal or that the court lacked certain information to reach a decision on the bail application.

- [23] The fact that hearsay evidence was relied upon by the learned magistrate despite direct evidence being available does not constitute a misdirection. Hearsay evidence will be allowed in bail proceedings even if direct evidence is available. Moreso, pertaining to issues not placed in dispute. In some case, as was found in *S v Green*, evidence pertaining to a disputed issue, if readily available and not prejudicial to the state, should be provided. (see: *S v Mauk* 1999 (2) SACR 479 (W)) where the court on the facts of that matter found that the withholding of the docket rendered the bail application a mere illusion).
- [24] In the appellant's case the evidence was in fact provided but just in a different format. The non-provision of the video footage, in my view, did not have the effect that the bail of the appellant became a mere illusion as without the footage the appellant would not have been able to discharge the onus placed upon him. He was informed what the case against him was and he was shown what evidence that State has against him, except for the DNA evidence pertaining to the rape count which was still outstanding.
- [25] The argument that the evidence by way of affidavit relating to what is contained in the video footage cannot be relied upon is, in my view, flawed. There was no challenge as to the reliability of this evidence. The basis of the court in *S v Green's* decision was that if there was a contentious issue and the reliability of evidence concerning this issue is challenged, and the evidence is readily available, such evidence must be provided to the court. The reason being, it places the applicant in a better position to adduce evidence to establish exceptional circumstances, which evidence the court can consider whether bail should be granted or not. It was not found that the hearsay evidence cannot be relied upon. The court in *S v Green*, supra at para [23] found with reference to the facts of that matter as follows:
- "On a proper consideration of the case on which the State relied any reasonable court must have concluded that it lacked reliable and important information necessary to reach a decision, notwithstanding that such information was apparently readily available."*
- [26] Hearsay evidence may in given circumstances have less probative value than real evidence, but in circumstances of this case, where the evidence was not disputed, the probative value of the allegations as to what is contained on video footage, supported by photographs created evidence with a high probative value.
- [27] In my view, the learned magistrate did not misdirect herself when she as part of her judgment found that the evidence by way of affidavit, buttressed by photographs showing what appears on the video footage was not only admissible evidence, but evidence which established a prima facie case against the appellant. The appellant's viva voce evidence and denials, in my view, left the circumstantial evidence intact. It will be for the trial court to draw inferences of guilt or not, and to find whether the State has proved its case against appellant beyond reasonable doubt.

[28] Consequently, I find that there was no need for the learned magistrate to have invoked s 60(3) of the CPA to call for further information or evidence. The learned magistrate could have considered the reliable evidence to adjudicate the bail application, particularly, the strength of the State's case against appellant.

[29] The fact that an accused applying for bail gave evidence viva voce in a bail application where s 60(11)(a) is applicable is a factor a court will bear in mind when considering the veracity of a version

placed before court. Such evidence, depending on circumstances, has more persuasive value than evidence by way of affidavit, considering

that the version could be tested by way of cross-examination. (See *S v Pienaar* 1992 (1) SACR 178 (W) at 180 H-J and *S v Mathebula* 2010

(1) SACR 55 SCA at para [11]). It does not mean that such evidence must be accepted, or, that such evidence outweighs evidence provided by the State by way of affidavit. The test will remain whether the applicant on a balance of probability satisfied the court that exceptional circumstances exist, which in the interest of justice permits his release on bail. All admissible evidence regardless how it was placed before the court will be considered.

[30] Considering the evidence holistically for purposes of a bail application, as opposed to a consideration of evidence on trial, I am of the view, that the circumstantial evidence placed before court established a strong prima facie case against the appellant. He, on his own version, placed himself in the vicinity where the murder took place. His explanation for his behaviour not to report his discovery immediately, as he did not want to implicate himself, appears to be suspect, but it is an issue for the trial court to decide. The appellant never provided any plausible reason why he removed his black shirt and replaced it with the blue t-shirt of the deceased. In my view, the learned magistrate was not wrong in finding that there was a prima facie case established against the appellant. Accordingly, it could not have been found that the state had a weak case, which in given

circumstances may contribute to the establishment of exceptional circumstances.

[31] If the appellant wanted to show that the State's case was weak, justifying his release, it was required of the appellant to prove on a balance of probabilities that he would be acquitted of the charge at trial. (see: *S v Mathebula* 2010 (1) SACR 55 (SCA) at para [11] and [12]; *S v Rudolph* 2010 (1) SACR 262 (SCA) at para [9]. In my view, an applicant in a bail application, where an onus is placed on the applicant to prove exceptional circumstances, would strengthen his or her application by presenting viva voce evidence instead of evidence by way of affidavit. This is what the appellant did but, in my view, the appellant still failed to discharge the onus placed on him. On the contrary, the State relying on circumstantial evidence, has shown that the case against the appellant at the trial will be a strong one.

- [32] Without being able to advance evidence to show that the State's case is weak, the personal circumstances shown by the appellant that he is a young student with a fixed address and not a flight risk, in my view, even if cumulatively considered, does not establish exceptional circumstances as envisaged in s60(11)(a). Having concluded as such, the Court is well aware that ordinary circumstances cumulatively considered can, in some instances, amount to exceptional circumstances. This is not such a case.
- [33] It was argued that the learned magistrate could not have concluded that the appellant is a danger to society and that this finding was wrongly used by the learned magistrate to refuse bail. The learned magistrate found that "Given the prima facie case against the Applicant, the court is of the opinion that the Applicant poses a danger to society, especially to the women in our community."
- [34] In my view, the refusal of bail without this further finding was warranted but the court will consider whether this finding amounted to a misdirection.
- [35] S 60(4) provides that the interest of justice does not permit the release from detention of an accused where, inter alia, there is a likelihood that the accused, if he is released on bail, will endanger the safety of the public. To make this determination a court can in terms of s 60(5) (a) have regard to the degree of violence towards others implicit in the charge against the accused. Implicit in the charge of murder and robbery with aggravating circumstances is a high degree of violence which was inflicted. The cause of death and the injuries sustained by deceased are indicative of a high degree of violence. A blunt object was used which caused serious trauma to the head of deceased. Admittedly, there is only a prima facie case against the appellant based on circumstantial evidence but there is certainly more than the mere charge referred to in s 60(5)(a). What the Court is dealing with is more than a mere unsubstantiated fear or suspicion that the appellant will endanger public safety. On acceptance of the strong case against appellant the finding did not constitute a misdirection.
- [36] The appellant failed to satisfy this Court that the learned magistrate wrongly refused bail.

36.1 The following order is made:

- a. The bail appeal is dismissed.

R STRYDOM

JUDGE OF THE HIGH COURT

Heard on:

03 June 2024

Delivered on:

19 June 2024

Appearances:

For the Appellant:

Adv. I.D. Masako SC

Instructed by:

Dane Von Branden Attorneys Inc

For the Respondent:

Adv. S.S. Futshana

Instructed by:

The National Prosecuting Authority

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