

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No.: CC11/2016

Date Heard: 8 June 2016

Date Delivered: 13 June 2016

In the matter between:

MNCEDISI NTENGO

Applicant

And

THE STATE

Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks an order that he be released on bail pending his trial. He is being arraigned in this court on one count of kidnapping and three counts of rape. The applicant has appeared in this court and the matter has been postponed from time to time. He has not previously applied for bail and his trial was already to have commenced in this court, however, by virtue of the exigencies of the court roll the matter has been crowded out. Mr **Thysse**, on behalf of the State, requests that I postpone the matter to 5 September 2016 for trial. It is, at least, in part this extended delay in the trial proceedings which gives rise to the present application. The State opposes the granting of bail.

[2] In the indictment the State alleges that on the night on 12 December 2014 to 13 December 2014 the applicant abducted the complainant (to whom I shall refer as “N.N”) and during the course of the night forced her, first into an empty shack, then

to an empty school classroom and ultimately again into a shack in New Brighton and that he raped her at each of these venues, per vagina and/or anally. The offence referred to in counts 2, 3 and 4 (rape) are offences listed in Schedule 6 to the Criminal Procedure Act 51 of 1977 (herein the “CPA”).

[3] Section 60(11)(a) of the CPA provides:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.”

[4] The effect hereof is that the applicant bears an onus to adduce evidence which satisfies the court on a preponderance of probability, (a) that there are exceptional circumstances and (b) which in the interests of justice justify the release of the applicant on bail. (See **S v Botha and Another** 2002 (1) SACR 222 (SCA) at para [20].)

[5] The thrust of the argument presented to me by Mr **Nel**, who appeared on behalf of the applicant, is founded on the alleged weakness of the State’s case. It is, I think, now widely accepted that the strength (or weakness) of the State’s case is relevant to the existence of “exceptional circumstances”. Where the applicant is able to prove that he will probably be acquitted at the trial it would establish “exceptional circumstances” which justifies his release on bail. (See **S v Botha and Another** *supra* para [21]; **S v Mauk** 1999 (2) SACR 479 (W) at 488a-b; **S v Mohammed**

1999 (2) SACR 507 (C) at 517i-j; **S v Yanta** 2000 (1) SACR 237 (TkH) at 243j; and **Woji v Minister of Police** 2015 (1) SACR 409 (SCA) at [3].)

[6] In **S v Mathebula** 2010 (1) SACR 55 (SCA) at 59 para [12] Heher JA summarised the position thus:

“[A] State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: That is no mean task ... [T]he applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a *prima facie* case of the prosecution failing there is no call on the State to rebut his evidence to that effect.”

[7] The applicant in the present matter chose, as he was entitled to do, not to testify. An affidavit by the applicant was handed up by Mr **Nel** together with certain annexures. The applicant further chose, again as he was entitled to do, not to reveal the basis of his defence to the charges. Captain Harmse, the acting officer commanding the Child Protection Sexual Offences Unit of the SAPS in Port Elizabeth testified on behalf of the State, mainly by reference to the content of the docket.

[8] The case put up by the applicant in respect of the weakness of the State’s case is set out in paragraph 8 to the applicant’s affidavit. The material portion thereof proceeds thus:

“A reading of the papers served by the prosecution presents the impression of confusion – by merely, for instance, comparing the summary of essential facts and the charge sheet with the complainant’s statement, questions arise about just where those allegations meet the facts as sworn to by someone who had used mandrax. ... The lady’s affidavit is attached: *Annexure B*. Her version of physical assault with a bottle is not clinically supported: see *Annexure C*. (The blood reflected there is not the complainant’s). She does not refer to the events contained in paragraph two of the summary. This blows apart count two. Apart from her sequence of steps in the alleged kidnapping differing from the chain of events summarised, she nowhere in her account goes near Mkhwayi Village (count one). These combined features hi-jack the kidnapping – that is apart from the plainly inherent implausibility of the tale. And once the abduction aborts – for being lost via detour – so does non-consensual sex, since the latter assumes as premise the former.”

[9] I accept for present purposes, as submitted by Mr **Nel**, that there are certain discrepancies between the statement of N.N and the summary of essential facts. This court, however, cannot decide issues of credibility of witnesses in an application for bail. That is a matter for the trial court which will have the opportunity to observe the witnesses and to consider any explanations given for such discrepancies. I think that this is precisely what Heher JA had in mind when noting that a case supposedly frail in advance may yet sustain proof beyond reasonable doubt when put to the test (see **S v Mathebula** *supra*). Moreover, as Mr **Thysse** on behalf of the State correctly points out, the State is not bound by the contents of the summary of essential facts (see section 144(3) of the CPA).

[10] The applicant contends that N.N’s version of an assault is not clinically supported. In substantiation hereof the applicant annexes, selectively, only the first page of the medico-legal report prepared by Dr Meslane who examined N.N at

17h00 on 13 December 2014. Dr Meslane found no physical injury and concluded that N.N had not been physically assaulted.

[11] Dr Meslane does, however, record that she found N.N to be significantly traumatised. Moreover it transpires from the evidence of Captain Harmse that the remainder of the medico-legal report, which was omitted by the applicant, reveals that the gynaecological and anal examination conducted by Dr Meslane led her to conclude that N.N had been penetrated both anally and per vagina. If that evidence is led and accepted then I think that it offers strong corroboration for material portions of N.N's version.

[12] Mr **Nel** argues, however, that the State still cannot prove that it was the applicant who had intercourse with N.N, and if it was, then consensual intercourse cannot be excluded. In respect of the first issue Captain Harmse testified that Dr Meslane will testify that she obtained certain swabs from the genitals of N.N and took possession of a grey boxer short worn by her. These were all packed and sealed in a sexual assault evidence collection kit and were subsequently tested and analysed. The applicant was positively linked by DNA to these exhibits. This evidence is attacked under cross-examination and Mr **Nel** contends that “no certificate of calibration” and “no certificate of DNA extraction” is contained in the docket. He argues therefore that the State cannot prove the chain which gave rise to the analysis linking the applicant to the biological exhibits. During his argument reliance was focused on the absence of proof of the extraction of DNA from the exhibits. In this regard Mr **Nel** found support in the recent judgment of **Tshantsani v S** (CA225/20114) [2016] ZAECHGC3 (16 February 2014). In **Tshantsani's** matter the

parties agreed that the sexual assault evidence collection kit was properly sealed by the relevant police official and was received at the Forensic Laboratory in Platteklouf still sealed, where the seal was broken by Lieutenant Colonel Charlene Otto for purposes of analysis. An affidavit by Lieutenant Colonel Otto in terms of section 212(4) of the CPA recorded that Lieutenant Colonel Otto, the chief forensic analyst of the Forensic Science Laboratory, concluded from her analysis that the DNA on the panty of the complainant had matched the DNA of the accused in the controlled blood sample. The accused admitted the proper handling of the kit until it reached the Forensic Science Laboratory where the seal was broken by Lieutenant Colonel Otto for purposes of analysis. In an appeal the only point raised was that counsel and the trial judge had misconstrued Otto's affidavit in as much as Otto never stated that she was the person who had broken the seal and had extracted the DNA from the complainant's panty and from the appellant's blood sample when the panty and sample arrived at the Forensic Science Laboratory. The point was upheld on appeal, however, the judges declined to finalise the matter and, after setting aside the conviction and sentence ordered that the matter be remitted to the trial court in order to hear evidence which may be adduced by the State and/or the defence with regard to the handling of the sexual assault collection kit after its arrival at the Forensic Science Laboratory in Platteklouf.

[13] In response to the argument Mr **Thysse** handed up a series of affidavits attested to in terms of the provisions of section 212 of the CPA dealing with the handling of the exhibits and the separation of portions of the samples prior to their ultimate receipt by one Lieutenant Boltman for purposes of analysis. On a perusal of these affidavits it seems to me, and I make no finding in this regard, that there may

be merit in Mr **Nel's** submission that they do not cover the entire chain in the process. Further evidence may be required. It does not follow, however, on a balance of probability, that the applicant will therefore be acquitted. It is clear from the section 212 affidavits before me that the entire chain of required DNA processes was in fact completed and DNA was in fact extracted. This is apparent from the fact that the results of the process was evaluated and analysed. In the event that any of the processes were preformed or overseen by another person, who has not already attested to a section 212 affidavit then there is every reason to believe that such person can readily be called to testify to the process. Similarly, if the calibration of the machinery is disputed the relevant documentation could be obtained. The applicant has certainly not put up any evidence which could, on a balance of probability, lead to the conclusion that such evidence is not available and that he will therefore be acquitted.

[14] Even if I err in this regard it still does not follow that the State will probably be unable to prove that it was the applicant who had intercourse with N.N. N.N is related to the applicant and she knows him well. She says that she had been with him at a tavern earlier that evening and that it was the applicant that had intercourse with her. The State therefore has direct evidence as to the identity of the perpetrator. Of course it is conceivable that the entire charge is a sinister plot to falsely implicate the applicant in these offences. That, however, is a matter that can only be judged when the State's case has been put to the test. On the evidence before me, however, I consider that Mr **Thysse** is correct where he submits that, *prima facie*, the State has a strong case in respect of this issue.

[15] That brings me to the second leg of the argument, namely, that the State does not have evidence to exclude consensual intercourse. This issue may easily be dealt with. N.N states that she was raped. Her evidence is direct evidence, the credibility of which can only be judged once it has been tested under cross-examination and the trial court has had occasion to consider the credibility of the witnesses before it, and, of course, the applicant, if he chooses to testify.

[16] The applicant raises certain criticisms of the complainant's version which he contends shows that he is likely to be acquitted on counts 1 (kidnapping) and count 2 (the first rape charge). He then concludes: "These combined features hi-jack the kidnapping – that is apart from the plainly inherent implausibility of the tale. And once the abduction aborts – for being lost via detour – so does non-consensual sex, since the latter assumes as premise the former". I do not agree. Even if N.N had accompanied the applicant of her own volition to the school classroom (count 3) and to Mhlaba Street (count 4) it does not follow as a matter of logic that she there consented to intercourse. In all the circumstances I think that the applicant falls far short of establishing that he will "probably" be acquitted. On the contrary, I consider that, *prima facie*, the State has a strong case against him.

[17] The applicant raises two further issues in support of his application. Firstly, he contends that he has been advised by the Legal Aid Board that his case would merely be a standby case on 5 September 2016 with every prospect for further delay until year end. This he points out, will entail a more than two year wait from the time of his arrest. I have already recorded earlier that I am requested by Mr **Thysse** to postpone the matter to 5 September 2016 for trial. Mr **Thysse** has advised the court

that he has been approached to proceed with the prosecution on 5 September 2016. In these circumstances, given the assurance by the prosecution, it must be accepted for purposes of this judgment that the prosecution will proceed on 5 September 2016. It accordingly involves a delay of a mere three months from the date hereof.

[18] Finally, the applicant states:

“[H]having gone through the case docket as it stands, there are certain persons that I might well want to call in order to refute the allegations of kidnapping and rape. I would have to be at liberty to seek them out, however, and assess their possible participation as defence witnesses if I were to have them summonsed to the stand. Unfortunately, the Legal Aid Board does not presume to have the means to investigate or locate them and itself depends on the good offices of the SAPS Investigating Officer of this case. Therein lies the rub and a direct conflict of interests which stares one in the face.

I have had bad treatment meted out to me by the case Investigating Officer: on the 14th December 2014, in the reception area of the police station after my arrest, the Investigating Officer told me that I am a rapist, she will lock me up and throw the key into the sea. She slapped my face and said I must unzip my shorts. She took my private part into her right hand and swung it from side to side, saying that with his dirty p... I rape people. This was humiliating. It happened where other police officers were about. They did not intercede. She also wrote out a statement and told me to sign. She was in a hurry to go and watch sport and did not explain my rights. Since then, on the way to DNA testing, she said that if I pleaded guilty she would speak for me for a lighter sentence.

On the 18th December, 2014, while in prison, the SAPS *Taakmag*, busy with *Operation Vala*, herded all of us out of the communal cell. With no cause therefor I was beaten with a truncheon on the ribs by an officer. I still sport the egg-like protrusion from my ribcage, plain for all to see. I tried to lay a charge but (has) had no follow-through from the Correctional Services or SAPS authorities these past six months. I have had to submit the papers to the Legal

Aid in the hope that they will come to see me this week. Hopefully, should I obtain bail, I would be able to pursue a criminal assault case against the perpetrator with more tangible result. To summarize the preceding three paragraphs: my preparation would suffer substantially in practical terms were I to be inside in circumstances no conducive for the reasons stated. I do not trust our police (do beg pardon)." (*Sic*)

[19] It need hardly be stated that no detainee is expected to endure the kind of criminal treatment of which the applicant complains. Clearly the authorities are required to accept his complaints and to investigate the alleged crimes with the same enthusiasm and vigour with which any other serious crime is investigated. He records, however, that he has now received the assistance of the Legal Aid Board in this regard and I have no doubt that these matters will now receive the attention which they deserve.

[20] The applicant raises his experiences whilst in incarceration in a different context, however, he contends that he is prejudiced in the preparation for his trial by virtue of the strained relationship which he perceives to exist between himself and the authorities and accordingly he has no confidence that they will assist in tracing witnesses whom he may wish to call at the trial. In this regard Mr **Thysse** has tendered the assistance of the Director Public Prosecutions office to intervene on his behalf and to make every endeavour to trace witnesses identified by the applicant through the services of the South African Police. I record that the investigating officer of whom the applicant complains is no longer involved in the matter and now serves as a court orderly. A new investigating officer has been appointed. In these circumstances I do not think that the limited prejudice which the applicant would

suffer in the preparation for his trial can outweigh the interests of justice in this matter. (Compare section 60(4) and (9) of the CPA.)

[21] Section 60(4)(a) of the CPA provides that:

“The interests of justice do not permit the release from detention of an accused

...

(a) Where there is the likelihood that the accused, if he or she were released on bail, will commit a Schedule 1 offence.”

[22] Section 60(11B)(a) provides that:

“In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether-

(i) The accused has previously been convicted of any offence; and

(ii) “

[23] In the present instance all that is provided in this regard in the application on behalf of the applicant is the following:

“About adhering to bail conditions: I admit I am no first timer but I have no priors for kidnapping nor rape (or personal violence of any sort since 17 years ago).”

[24] In truth it transpires from the evidence of Captain Harmse that the applicant has a string of previous convictions. Some of these convictions go back a considerable period of time and I do not consider that they should have a material influence on the present application. What are, however, material are the more recent convictions. The applicant was convicted of housebreaking in 2008 and sentenced to 5 years imprisonment. In the same year he was convicted and

sentenced for the unlawful possession of ammunition and sentenced to a period of 6 months imprisonment. On 27 July 2012 the applicant was convicted of theft and sentenced to 4 years imprisonment of which 1 year was conditionally suspended. Also in 2012 the applicant was convicted of the possession of a prohibited drug and was sentenced to a fine of R300 or 3 months imprisonment conditionally suspended in its entirety. Upon specific enquiry during the application the applicant acknowledges that at the time of the alleged commission of the crimes presently under consideration he was on parole, having been released early from custody, prior to the expiry of his sentence for theft.

[25] All of the above offences constitute offences listed in Schedule 1 of the CPA. They have a material bearing on this application and they were not disclosed to the court. Mr **Nel** was unable to provide any reasonable explanation for the failure. He seeks to explain that they were not disclosed because the applicant knew that the State would reveal his previous convictions. In view of the statutory provisions which I have referred to earlier and the significance of the convictions to the merit of the application the explanation is clearly not satisfactory.

[26] I have dealt earlier with the onus which rests upon an applicant in bail proceedings and I am unable to find that the applicant has placed any exceptional circumstances before me nor that he has discharged the onus of establishing that it is not likely that he would commit a Schedule 1 offence if he were released on bail.

[27] In all the circumstances:

1. The application is dismissed.
2. The case is postponed to 5 September 2016 for trial.
3. The accused (applicant) is to remain in custody.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv CHO Nel SC instructed by the Justice Centre, Port
Elizabeth

For Respondent: Adv J Thyse instructed by the National Director of Public
Prosecutions, Port Elizabeth