

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

CASE NO: CA&R 13/2018

Date heard: 1 October 2018

Date delivered: 3 October 2018

In the matter between

RICARDO TROMP

First Appellant

JUVANO VAN STAADEN

Second Appellant

RYAN ALBERTO LEEUW

Third Appellant

And

THE STATE

Respondent

JUDGMENT

GOOSEN, J.

- [1] The appellants have been charged with kidnapping and rape. The incident giving rise to the charges is alleged to have occurred on 1 December 2017. It is alleged that several men, including the appellants, entered the home of the complainant and her boyfriend. The two of them were taken to a deserted house where they were held. It is alleged that the complainant in respect of the rape charge, an eighteen year old woman, was repeatedly raped by the appellants.

- [2] The appellants were arrested on these charges on 2 December 2017. After their appearance in court they initiated a bail application, which was commenced on 6 December 2017. The bail application was postponed on several occasions. They were represented throughout. On 22 February 2018 the application for bail was abandoned. On 16 March 2018, when the appellants again appeared in court, the matter was remanded for a formal bail application. When the matter came before the magistrate, the magistrate ruled that the bail application would need to be commenced *de novo* since the earlier application had been abandoned. There was a postponement which flowed from this and thereafter further postponements. The application for bail proceeded on the basis of evidence tendered by the appellants. The state opposed bail and presented the evidence of the investigating officer, warrant officer Andrews, by way of affidavit. The magistrate dismissed the bail application. It is against this judgment that the appellants appeal.
- [3] It is common cause that the offences for which the appellants are charged fall within the ambit of Schedule 6 of the Criminal Procedure Act, 51 of 1977 (hereinafter 'the CPA'). Accordingly the *onus* rested upon the appellants at the bail application to establish exceptional circumstances which would render it in the interests of justice to release them on bail.
- [4] Section 65 (4) of the CPA provides that a judge hearing a bail appeal shall not set aside the decision against which the appeal is brought unless satisfied that the decision was wrong. This court's powers on appeal, as held in *S v Barber*,¹ are limited:

Th[e] 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 that would be an unfair interference with the magistrate's exercise of its discretion. I think that 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 but exercised that discretion wrongly.

¹ 1979 (4) SA 218 (D) at 220E-H

- [5] In *S v Mbele and another*² it was held that s 65 (4) envisages the following approach:

In other words, this Court is required to approach the appeal on the basis of the assumption that the decision of the Court below, was correct, and not to interfere with that decision unless “satisfied” that it was wrong. Generally speaking, such a state of “satisfaction” will not be reached by the minds of the members of a Court of appeal unless they are persuaded accordingly. In the ordinary course, therefore, it remains for the appellant to persuade the Court of Appeal that the Court below, was wrong. Although the term “onus” or “burden” may obviously be used in broad and narrow senses, its technical connotations relating to the incidence of the burden of proof of facts in a trial action may perhaps render it an unsuitable term to use in the context of a bail appeal. Whatever terminology may be employed, the idea that must be grasped is that the Court of Appeal is required to uphold the order made by the Court below, until enough has been done to persuade and satisfy the Court of Appeal that the order was wrong, and, in the ordinary course, it is for the appellant to do whatever has to be done in that regard.

- [6] The court must be satisfied, having regard to all of the circumstances and the evidence placed before the court *a quo*, that the magistrate was wrong in refusing to admit the applicant to bail. Where, of course, the court *a quo* misdirected itself materially on the facts or on the application of legal principles, the court of appeal may consider the question of bail afresh (see *S v Mpulampula*³ and *S v Jacobs*⁴).
- [7] In the notice of appeal the appellants set out the full history of the several postponements of the bail proceedings. It is indicated therein, as borne out by the record, that the initial bail application was abandoned after several postponements at which the appellants were represented. The renewed application was similarly postponed, apparently due to the presiding officer not being available on certain occasions.
- [8] It was argued that the delay in the proceedings was such as established exceptional circumstances entitling the appellants to bail. I disagree. While it is troubling that the bail application was not prosecuted to finality expeditiously, the delay appears to have arisen because of several factors, including the

² 1996 (1) SACR 212 (W) at 221h

³ 2007 (2) SACR 133 (E) at 136e

⁴ 2011 (1) SACR 490 (ECP) at para [18]

abandonment of the application by the appellants. In any event the delay had no bearing on the substantive consideration of the application.

- [9] The appellants prosecute the appeal on the basis that the state case against them is weak. It was submitted that the state relied upon an affidavit deposed to by the investigating officer. As I understood the submission, it was that the limited probative value of such evidence, when considered against the *viva voce* evidence of the appellants, ought to have persuaded the magistrate that they had discharged the *onus*.
- [10] It is so that affidavit evidence may carry less probative value in circumstances where the evidence is challenged by *viva voce* evidence. However, that does not mean that it is to be disregarded. Where an affidavit is put up by an investigating officer to explain the nature of the case against an accused person, such evidence may nevertheless be decisive. The magistrate was alive to the fact that the state had relied upon an affidavit deposed to by the investigating officer. The magistrate, correctly in my view, weighed all of the evidence, including the alleged alibis of the appellants.
- [11] The evidence deposed to by the investigating officer sets out the evidence available to the state. That evidence consists of the testimony of the complainant and her boyfriend. The affidavit recounts their version of events, detailing the circumstances of the kidnapping and that they were held at a deserted house. It explains that this is where the rapes occurred and that the police were alerted when the complainant's boyfriend managed to escape. Of significance, it explains that the appellants are known to both complainants and that they were pointed out upon their arrest.
- [12] It was argued that this evidence of 'identification' constitutes mere say-so. At the stage of bail proceedings it is necessary only to outline the nature of the state's case and the type of evidence that the state has against the accused person. It is not required of the state to prove its case. Such evidence as to the nature and

strength of the state case serves to establish a factor which is taken into account in determining whether or not exceptional circumstances exists which warrant the release of the accused person on bail.

- [13] It was argued on behalf of the appellants that the magistrate had approached the question of bail on an incorrect footing; that he had paid undue attention to the seriousness of the offence and had failed to accept that the appellants' personal circumstances, lack of previous convictions and that permanent addresses mitigated any potential flight risk.
- [14] In regard to the third appellant it was submitted that the magistrate had failed to take into consideration his ill-health and that this alone qualifies as an exceptional circumstance. There is no substance in the submission. The magistrate's judgment deals fully with the evidence of the third appellant relating to his osteo-arthritis, for which he requires medication. The judgment deals with the availability of treatment and medication in the prison and accepts, on the evidence, that access to medication does not pose a difficulty and that, to the extent required, externally supplied medication can be made available. The judgment also deals with the prison conditions. All of the factors upon which the third appellant relied were taken into account. It was found however, in my view upon a sound evidential basis, that the third appellant has sufficient and proper access to medical care whilst in custody and accordingly that his medical condition does not constitute an exceptional circumstance.
- [15] It was further submitted that the magistrate had failed to take into account the alibi evidence presented by the third appellant as well as the evidence relating to a petition signed by members of the community urging the release of the third appellant. In both these submissions, counsel was incorrect. The judgment refers to this evidence. Indeed the judgment deals with the evidence of each of the appellants as well as that presented on their behalf.

- [16] The challenge to the magistrate's ruling, although couched on the basis of error or misdirection, does not in fact posit a misdirection in relation to the facts. The challenge to the magistrate's decision is framed in more general terms, namely that the magistrate was wrong. The argument proceeded along the lines that the magistrate ought to have found that exceptional circumstances were present and was accordingly wrong in finding that the appellants had not discharged the *onus*.
- [17] In respect of the first and second appellants, their challenge to the state case was premised upon mutually supporting alibis to the effect that they were in each other's company drinking at the place where they both work. This latter place, it transpired, was a shop which also served as a drug-post. In my view, even taking into account the form in which the state evidence was presented, the magistrate cannot be faulted for considering that the challenge to the state case did not constitute an exceptional circumstance. In respect of the evidence relating to where the first and second appellants live, the magistrate was equally correct in finding that the evidence established no more than that the appellants spent some time at those addresses but were not always there.
- [18] It was argued that the magistrate did not consider the range of factors set out s 60 (4) – (9) of the Act. The judgment however specifically refers to the relevant sections which are to be considered in terms of s 60 (11). While each of the factors is not enumerated and addressed in the judgment, it cannot be found that the magistrate did not give consideration to them.
- [19] It should be borne in mind, as was stated in *S v DV*⁵, upon which appellants placed reliance, that,

An applicant in a bail application is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant (accused) or anything else that is particularly cogent. (See *S v Dlamini*; *S v Dladla and Others*; *S v Schietekat* 1999 (2) SACR 51 (CC) (1999 (4) SA 623); 1999 (7) BCLR 771), in particular paras 75 and 76 thereof.) Personal circumstances to an exceptional degree may lead to a finding that release on bail is justified. (See *S v Rudolph* 2010 (1) SACR 262 (SCA).)

⁵ 2012 (2) SACR 492 (GNP) at par [7] – [8]

In the context of s 60 (11) (a), the exceptionality of the circumstances must be such as to persuade a court that it would be in the interest of justice to order the release of the person of the accused. A certain measure of flexibility in the judicial approach to the question is required. (See *S v Mohamed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 5330 at 513f-515f.)

[20] The magistrate addressed the evidence which was adduced by the appellants in order to discharge the *onus*, but nevertheless came to the conclusion that the appellants had not established that it was in the interests of justice that they be released on bail. I have already pointed to the fact that the appellants could point to no material misdirection in this regard. Nor could I discern any such misdirection upon consideration of the judgment and the evidence before the magistrate. To interfere with the magistrate's refusal of bail in such circumstances would require that I be satisfied that the magistrate had exercised the discretion wrongly. I am not so satisfied. It follows that the appeal cannot succeed.

[21] I therefore make the following order:

The appeal is dismissed.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Appellants
Mr. M. Moolman
Attorney

For the Respondent
Adv. G. Baartman
Director of Public Prosecutions