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

Case No: 15491/23P

In the matter between:

**S[...] W[...] B[...]**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**ORDER**

**On appeal from:** the Magistrates Court, Greytown Mr. CF Masikane sitting as court of first instance:

- (a) The bail appeal succeeds, and the order of the court below is set aside and replaced with the following order:
- (b) The appellant is granted bail in the sum of R10 000.00 subject to the following conditions:
  - (i) The appellant is prohibited from entering Greytown, unless he is required to attend court in this matter.

- (ii) The appellant is prohibited to make contact, directly or indirectly with the complainant and/or with the complainant's grandmother.
- (iii) The appellant is to report at Kranskop police station twice a week, every Tuesday and Friday between 6am and 6pm.
- (iv) Should he change his current address, the appellant must inform the investigating officer.
- (v) The appellant is ordered to attend his trial on the given date and on subsequent days not later than 8h30am and to remain in attendance until this matter is finalized or he is excused by the court.
- (vi) The appellant is to remain at his place of residence at Matimatolo.

## **JUDGMENT**

**Delivered on: 19 December 2023**

**Ntlokwana AJ**

### **THE INTRODUCTION**

- 1) This is a bail appeal from the Greytown Magistrate's court, where the applicant brought his bail application on the 15th of August 2023 with a judgment refusing bail delivered on the 23rd of August 2023. The appellant was arrested on the 23rd of July 2023 on a charge of rape, the victim is a minor child below 16 years old.
- 2) The charge preferred against the appellant is a Schedule 6 offense. This was common cause between the parties. The provisions of section 60(11)(a) of the Criminal Procedure Act 51 of 1977 thus, are applicable. This section requires the

applicant to present evidence and satisfy the court that exceptional circumstances exist, which is in the interest of the justice, warrant his release on bail.

3) In refusing bail application, the learned Magistrate concluded that there was nothing out of the ordinary in the applicant's case, even ordinary common circumstances taken cumulatively failed to establish exceptional circumstances.<sup>1</sup>

4) The learned Magistrate made the following findings:

a) That there is a likelihood that the applicant will attempt to influence or intimidate the State witnesses more in particular the victim;

b) that there is a likelihood that the release of the appellant on bail will disturb the public peace, cause shock and outrage in the community;

c) that, if released on bail, there is a likelihood to evade trial as he is facing life imprisonment if convicted of the offense.

5) The appellant is challenging the findings of the learned Magistrate on the basis that, the learned Magistrate was wrong to find as he did that, the appellant had failed to satisfy the court that there exist exceptional circumstances which, in the interest of justice, warrant the admission of the appellant to bail.

6) Further, it is also challenged that there is a likelihood that the appellant posed a risk in respect of any of the traditional bail considerations if he were to be released on bail, specifically section 60(4)(a) to (d) of the Criminal Procedure Act.

7) Another ground of appeal is that the learned magistrate was wrong in his findings that there is a likelihood that the appellant's release on bail will disturb the public order as envisaged in section 60(4)(e) of the Criminal Procedure Act.

8) In terms of section 65(4) of the Criminal Procedures Act, it is stated that:

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<sup>1</sup> Record pages 148 & 155

“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 on its or his opinion, the lower court should have given.”

This court, therefore, is not at liberty to interfere with the decision of the learned magistrate, unless it is satisfied that the decision taken by the learned magistrate is wrong in which case the judge hearing the appeal will give the decision ought to have been given by the lower court.

9) This assertion finds support in *S v Porthern and others*<sup>2</sup> where it is stated that the court’s power to intervene in terms of section 65(4) of the Criminal Procedure Act, is not per se strictly limited to what is provided in *S v Barber*.<sup>3</sup> The appeal court is empowered to undertake its own assessment of the evidence presented before the lower court and make its own finding, whether the appellant has discharged the onus in terms of satisfying the court that there exist exceptional circumstances, which in the interest of justice, warrant the appellant to be released on bail, as envisaged in section 60(11)(a).

10) Before an appeal court can interfere with the finding of the lower court, it is required that there must be a finding that the magistrate misdirected himself, in a material way either on facts or on the interpretation of the law, absent misdirection, the appeal cannot succeed.

## **THE FACTS**

11) The appellant is the father of the complainant, a 7 year old female minor child. He testified on his behalf, stating that he is 60 years of age, and is residing in Matimatolo area. He works at the Department of Transport earning R14 000 a month. Sometimes he would be stationed at Greytown or alternatively at Kranskop, and he regards these two places as his workstations where he would be placed for a

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<sup>2</sup> 2004(2) SOCR 242(c)

<sup>3</sup> 1979(4) SA 218(D) 220 E-H

year or two on either of them. He is the father of eleven (11) children, two (2) of whom are minors, including the complainant. Both minors are now living with their grandmother in Greytown, where they also attend school there.

12) As a side business, the appellant runs a tuck shop in Matimatolo with the assistance of his partner and earns about R6 000 to R8 000 a month from the tuck shop. To support the minor children, the appellant would send funds to their grandmother, a variety sum of no less than R1 500 per month.

13) On 29 June 2023, the appellant fetched the complainant together with the younger sibling, a 5-year-old boy, from their grandmother in Greytown for visitation at his home in Matimatolo. They stayed with him till 5 July 2023, on that date, the appellant left to Newcastle, for work purposes and remained there for a while.

14) The appellant received a call on the 9th of July 2023 from his partner at Matimatolo, advising that she had noticed that the complainant has blood drops or blood clots in her urine every time she goes to the bathroom. The appellant requested his partner to take the complainant and the other minor child to their grandmother in Greytown, who then must take the complainant to the doctor for a medical checkup. The appellant was in Newcastle and in no position to attend to the sickness of the complainant at the time. Indeed, the appellant's partner took the minor children to their grandmother in Greytown and reported her observations.

15) The appellant was thereafter informed by the grandmother that the complainant has been abused, and no further information was provided. The appellant returned from Newcastle on 27 of July 2023 and went to hospital to enquire about the complainant's wellbeing. At the hospital, he did not find the complainant, and was informed at the hospital by Police Officer Xaba that the complainant has been taken by social workers and that a case has been opened at Greytown Police Station, and that the investigation was handed to a female Police Officer.

16) The following day on 28 July 2023, the appellant went to the Greytown Police Station to meet up with the Police Officer handling the matter. On his way, he met the grandmother of the complainant and asked her how the complainant was coping.

The response was that the child was suffering from stomach aches, he noticed that the grandmother had no interest in talking to him. He proceeded to the police station where he met Sergeant Mazibuko. Sergeant Mazibuko confirmed with the appellant if he was Mr. B[...] and asked him to get inside. The appellant moved inside, he was then informed that he was being arrested for the rape of the complainant and was detained at the police cells. In respect of the charge, he intends to plead not guilty.

17) The appellant further testified that he is a member of the Economic Freedom Fighters, a political party, where he is an active political participant and is a municipal councilor. He is willing to relocate to Kranskop as he is also allowed to work in Kranskop. The appellant closed his case.

18) The State called one witness, Sergeant Thembeke Mgobhozi. Under cross-examination of the appellant, it was put to the appellant that the Investigating Officer was going to come to court and testify that, if appellant were to be released on bail:

- a) it would cause public outrage;
- b) the appellant is likely to threaten the victim in this matter;
- c) the appellant was likely to interfere with the investigation because the witnesses are known to the appellant.

19) In response to these allegations, the appellant denied that he was likely to cause any of the allegations put to him.

20) Sergeant Mgobhozi testified that she got a call on the 26th of July 2023 from a Social Worker from Greytown Hospital requesting her to come to the hospital. On arrival, she met with the complainant who informed her that she was a victim of rape by her father, the appellant. Sergeant Mgobhozi was told by the complainant that, when the appellant was done hurting her, he told her to go and take a bath, the appellant also told her not to tell anybody and not to mention what happened to anybody. The complainant did not tell anybody after the incident as she was scared. The complainant was only able to tell of what happened when taken to her

grandmother, who took her to hospital where it was confirmed that indeed the complainant was sexually assaulted, and a case of rape was opened on the 17th of July 2023.

21) Sergeant Mgobhozi highlighted two main grounds upon which the State is opposing bail:

a) One was that if the appellant is released on bail, she felt that there was a likelihood that it will cause public disturbance and undermine public peace. The reason she gave was that since the start of the appellant's appearances at court, she had seen the community gathering outside the court demanding that the appellant should not be granted bail.

b) The second ground stated by Sergeant Mgobhozi was that appellant is a threat to the complainant. In support of this, she stated that the appellant has already threatened the complainant, telling her not to mention to anybody about what happened. Sergeant Mgobhozi was at the hospital when the appellant went there looking for answers as to the whereabouts of the complainant, she noticed how the complainant refused to see the appellant, telling everyone not to tell the appellant that she was there, apparently scared of the appellant.

22) Under cross-examination, Sergeant Mgobhozi testified that there was nothing that she was aware of, when asked if after the arrest of the appellant had there been any indication of threats by the appellant to the complainant. She also had no information that there was a likelihood of the public disorder and outrage if appellant was released on bail. She further conceded that the appellant is unlikely to run away and not attend trial. It was also conceded that, despite the alleged threat to the complainant, she was able to tell what happened to the nurse, social worker and to the sergeant.

23) After the end of testimony of Sergeant Mgobhozi, the state requested to hand to court a memorandum apparently received from the community leaders,

“for the court to consider the memorandum in the bail application and to attest to what has been attested by the Investigating Officer about the community feelings towards this matter.”<sup>4</sup>

24) The defense objected, on the basis that the said document has not been furnished to the defense and defense had not had sight of it, nor had taken instructions thereto. Secondly, the defense raised concern about handing over a document to court as exhibit without any evidence under oath where such evidence can be put to scrutiny of cross- examination. The learned Magistrate over-ruled the objection, stating that the document was handed to the state by the community, it was thus proper to admit it as evidence. It was marked Exhibit “B”. The State closed its case.

25) I am required to determine whether or not on the assessment of the evidence it can be established that, there exist exceptional circumstances, which in the interest of justice, warrant the appellant’s release on bail and whether the learned Magistrate was wrong in his finding.

### **THE MEANING OF EXCEPTIONAL CIRCUMSTANCES**

26) In S vs Dlamini and Others,<sup>5</sup> Kriegler J observed that:

“Section 60(11)(a) does not contain an outright ban on bail in relation to certain offenses but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of the bail is under judicial control, and judicial officers have the ultimate as to whether or not, in the circumstances of a particular case, bail should be granted.”

Section 60(11)(a) of the Criminal Procedure Act reads as follows:

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<sup>4</sup> Index 113 – 114

<sup>5</sup> 1999 (2) SACR 51 (cc) at para 24

“(11) Notwithstanding any provisions of this act, where an accused is charged with an offense 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 interest of justice permit his or her release.”

The onus therefore is on the appellant to adduce evidence to the satisfaction of the court that exceptional circumstances exist which in the interest of justice warrant his release on bail. *S v Yanta*<sup>6</sup> confirms this in that, effectively this provision shifts the onus to the accused to convince the court on a balance of probabilities, that there exist exceptional circumstances which in the interest of justice, warrant the release of the accused on bail.

27) The conduct of the appellant, leading to his arrest, the manner in which the accused co-operated with the police and handed himself to the police when it turned out that he was the suspect in the matter, constitute ‘exceptional circumstances’ which should have been considered in his favour for the purposes of Section 60(11)(a). This view finds support in *S v Matshaba*<sup>7</sup> where Molefe AJ held that:

“having regard to all the circumstances of the case, the fact that the appellant had co-operated with the police and had handed himself over to the police when he heard that the vehicle he was storing for some co-accused was linked to murders, constitutes exceptional circumstances as envisaged in Sec 60(11)(a).”

28) The requirement to show exceptional circumstances for purposes of Sec 60(11)(a) does not place extra-ordinary, over-and-above standard which would make it impossible for an exceptional but deserving applicant to obtain bail.<sup>8</sup>

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<sup>6</sup> 2000 (1) SACR 237 at 241

<sup>7</sup> Unreported GNP case no A725/12, 6 November 2012

<sup>8</sup> *S v Josephs* 2001(1) SACR 659 (c) 667 at 668i

29) Whilst the onus is on the accused to prove to the satisfaction of the Court, it has been held that where there was an inability of the Investigating Officer to advance reasons or grounds for refusal of bail, such inability constituted 'exceptional circumstances' in consideration for release of the accused on bail. Mere accusations and say so of the investigating officer are not enough.<sup>9</sup> The evidence of Sergeant Mgobhozi tended to lean more on her views other than sufficient reasons or grounds in opposing bail.

30) What is to be looked at is whether the proven circumstances are sufficiently unusual or different in any particular case. In *S v Vanqa*,<sup>10</sup> Jafta J observed that,

"circumstances which are ordinary nature to bail applications can, in the context of the particular case, be exceptional or unusual. The applicant for bail in such cases is not required to prove the existence of factors different to normal considerations listed in ss(4)- (9) of s60. What is required of him, however, is to show that such usual or common factors are, in the context of his case, blended with the element of exception or difference. Such circumstances do not require to be extraordinary in the sense of a cat giving birth to a dog."

31) Commenting on the appropriate application of Sec 60 (11)(a) of the Criminal Procedure Act, Krigler J, in *S v Dlamini*,<sup>11</sup> stated that courts should avoid to be caught up on what would be perceived public sentiments being orchestrated by pressure groups designed to serve their own interests.

## **THE ANALYSIS**

32) Counsel for the appellant submitted that, the learned magistrate was wrong in finding that there were no exceptional circumstances adduced by the evidence of the appellant at all. It was highlighted that, the appellant's co-operation with the Police on the 28th of July 2023 at Greytown hospital, and his subsequent attendance on the 29th of July 2023 to the Greytown police station to meet Sergeant Mgobhozi,

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<sup>9</sup> *Nkambule v S* unreported GSJ case no. A134/2013 (2 May 2013) para 15

<sup>10</sup> 2000 (2) SACR 371 at 376

<sup>11</sup> *Supra* fn 5 at para 56

handing himself to be arrested constituted exceptional circumstances as envisaged in Sec 60(11)(a). The state's counsel, conceded that, the appellant's co-operation with the police constituted exceptional circumstances, the state did not present any evidence which contradicted the appellant's evidence leading to his arrest. Sergeant Mgobhozi on her testimony stated that she was at the hospital when the appellant arrived and being told to attend to Greytown police station to meet with the female police officer. The police could have arrested the appellant on the 28th of July 2023 but instead requested him to present himself the following day at Greytown police station. The concession was correctly made in my view, on this basis, the learned Magistrate was wrong in his decision.<sup>12</sup>

33 The learned magistrate also made a finding that, if the appellant were to be released on bail, there is a likelihood that it will disturb the public peace and will cause shock and outrage to the community. Under cross-examination, Sergeant Mgobhozi admitted that other than the community people who were gathered outside court, who were demanding that the appellant should not be released on bail, she had no knowledge nor information of any likelihood that the community will disturb peace if appellant is released on bail. The question to be asked is whether the people who gathered outside court in opposition of the bail were community members or were members of Abantu Botho Congress Party, a political party whose memorandum was admitted into evidence as exhibit "B" under the notion that it was a memorandum for the community leaders with signatures of the people who were opposed to the appellant to be released on bail. A court should be wary of admitting documentary exhibits, which had not been disclosed to the other party. The learned magistrate in his judgement placed no reliance on the political party's memorandum, however that was not the end of the matter.

34 The gist of the evidence presented by Sergeant Mgobhozi about the likelihood of community disturbance of peace and the manner exhibit "B" was introduced to court leaves one with an inescapable conclusion that her evidence about the community's likelihood to cause disturbance of peace and exhibit "B" are intertwined, with the memorandum being a back-up of the evidence of Sergeant Mgobhozi. This

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<sup>12</sup> See *S v Machaba* supra fn 7

became clear when the court enquired as to what was the purpose of the exhibit. The answer from the state was that it was for the court to go through it, for the court to consider the memorandum in the bail application, to attest to what has been attested by the investigating officer on the feelings of the community towards the bail application.<sup>13</sup> At no stage was the court informed that the memorandum came from political party, a rival political party to appellant.

35. The state misled the court into accepting a memorandum from Abantu Botho Congress Party being told it was from leaders of the community. The memorandum is headed, Memorandum by Abantu Botho Congress (ABC) in bold and is directed for the attention of Greytown Magistrate Court as well as to the South African Police Services, Greytown and Matimatolo. The memorandum has seventy-one (71) signatures from members of Abantu Botho Congress, and amongst other things demanding refusal of bail and that their demands be placed on record. True to their demands, the memorandum was admitted into record as exhibit “B”. The learned magistrate, whilst correctly discarded the contents of exhibit “B” committed a misdirection by accepting the evidence of Sergeant Mgobhozi that the release of the appellant on bail will disturb the public order, as her evidence was based on the gathering of Abantu Botho Congress Party outside the court premises. The warning by Krigler J in *S v Dlamini*<sup>14</sup> on ‘the danger of public sentiments being orchestrated by pressure groups to serve their own ends’ was not heeded by the learned magistrate. I am of the view that the learned Magistrate was wrong in finding that, if appellant is released on bail, that will disturb public order.

36. The learned magistrate has also made a finding that, if released on bail, there is a likelihood that the appellant will attempt to influence or intimidate the state’s witness, in particular, the victim. The reason for this finding is that when the appellant visited the hospital, the complainant did not want to meet with him, and was scared. The complainant is now staying with her grandmother in Greytown and is attending school there. Counsel for the state in her submission conceded that there are no threats made to the complainant since the arrest of the appellant, and that any risk of interference with the state witness can be reduced by appropriate bail conditions. I

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<sup>13</sup> Index 113-114

<sup>14</sup> Supra fn 5

am satisfied that, with appropriate bail conditions the risk of likelihood of intimidation of the witnesses, in particularly the complainant, can be restrained.

37. The learned magistrate held that the appellant posed a likelihood to evade trial if released on bail given the life imprisonment sentence if he were to be found to have committed the offence. The reason for this finding is that –

‘because of the possible life sentence if convicted, temptation is always there to evade a trial.’<sup>15</sup>

Under cross-examination, it was put to state witness, Sergeant Mgobhozi, that the appellant is not a flight risk who is likely to evade trial. Before the question was responded to by Sergeant Mgobhozi, the learned magistrate interjected, stating that,

“I do not know why you even put that. It is a waste of time, it is not her evidence. It is not disputed that he is not a flight risk.”<sup>16</sup>

The finding of likelihood to evade trial, where there was no evidence presented to that effect, lends itself to miscarriage of justice. Prudent adjudication should have prevailed to allow the question put to the witness, bearing in mind that the onus was on the appellant to satisfy the court that, exceptional circumstances existed which in the interest of justice warrant the appellant to be released on bail. The learned magistrate was wrong in his finding that the appellant was likely to evade trial.

38. I am satisfied that the decision of the court aquo was wrong, in that regard I shall proceed to give the decision which the court aquo should have given.

40. The appellant co-operated with the police and handed himself to the police, leading to his arrest at the police station. He has no previous convictions and has no pending cases. He is 60 years old, gainfully employed with 11 children. He has no interest beyond the borders of South Africa, has lived all his life at Matimatolo area outside Greytown, he is unlikely to evade trial. Counsel for the state submitted that a

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<sup>15</sup> Index 154

<sup>16</sup> Index 106

bail amount of R10 0000.00 and a prohibition to enter Greytown would be appropriate to ensure that the interests of justice are protected.

41. Having considered the circumstances pertaining to the appellant and the evidence presented at the court aquo, I am satisfied that the appellant has established the existence of exceptional circumstances which in the interest of justice, permit his release on bail pending trial.

42. In the results the following order hereby issues, namely:-

(a) The bail appeal succeeds, and the order of the court below is set aside and replaced with the following order:

(b) The appellant is granted bail in the sum of R10 000.00 subject to the following conditions:

(i) The appellant is prohibited from entering Greytown, unless he is required to attend court in this matter.

(ii) The appellant is prohibited to make contact, directly or indirectly with the complainant and/or with the complainant's grandmother.

(iii) The appellant is to report at Kranskop police station twice a week, every Tuesday and Friday between 6am and 6pm.

(iv) Should he change his current address, the appellant must inform the investigating officer.

(v) The appellant is ordered to attend his trial on the given date and on subsequent days not later than 8h30am and to remain in attendance until this matter is finalized or he is excused by the court.

(vi) The appellant is to remain at his place of residence at Matimatolo

APPEARANCE DETAILS:

|                        |                                 |
|------------------------|---------------------------------|
| For the Appellant:     | Mr. L Barnard                   |
| Instructed by:         | Bheki Masuku Attorneys          |
| For the Defendant:     | Ms. L Marais                    |
| Instructed by:         | Director of Public Prosecutions |
| Matter heard on:       | 22 November 2023                |
| Judgment delivered on: | 19 December 2023                |