

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case. No.: A36/2024

Regional Court Case No.: SHG 03/2022

Hearing on 6 March 2024

Judgement on:11 March 2024

In the matter between:

ZUNAID VARDIEN

Appellant

and

THE STATE

This judgment was handed down electronically by email circulation to the parties' legal representatives' email addresses.

JUDGMENT

SLINGERS J

- [1] On 4 April 2023 Zunaid Vardien, the appellant, was convicted of two counts of rape and two counts of sexual assault. All four charges pertained to the same complainant and were committed in 2013 when she was aged nine (9) years old and the appellant was aged seventeen (17) years old. The appellant was arrested on 19 May 2021 when he was twenty five (25) years old. When the appellant was sentenced to an effective term of 8 years' imprisonment on 6

October 2023 he was twenty seven (27) years old. The appellant has been in custody since 10 October 2023.

- [2] The court *a quo* refused the appellant leave to appeal against his conviction and sentence. However, on petitioning this court the appellant was granted leave to appeal against his conviction and sentence. Thereafter, the appellant applied for bail pending his appeal. This was refused by the court *a quo* on 6 February 2024. The appellant now appeals against this refusal of bail pending his appeal.
- [3] The offences for which the appellant was convicted fell within the ambit of schedule 6 and therefore, the appellant bore the onus to show the existence of exceptional circumstances which showed that it was in the interests of justice that he be released on bail.
- [4] As stated in *S v Masoanganye and Another*¹ in an appeal against the refusal of bail pending an appeal, it must be borne in mind that the decision to grant bail is one entrusted to the trial judge as he/she *'is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case.'* Furthermore, that the appeal court must defer to the trial court's decision unless it is shown that the trial court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.²

¹ 2012 (1) SACR 292 (SCA)

² See para [15]

- [5] As the appellant has been convicted the presumption of innocence no longer applies. As stated in *Rhode v S*³ other considerations come to the fore following the conviction of an accused. These considerations include an increased risk of abandonment once a person has been convicted and sentenced to a lengthy period of imprisonment and the severity of the sentence imposed will be a decisive factor in the court's discretion to grant bail or not.
- [6] The court went on to hold that the fact that the accused had been granted leave to appeal was an important consideration, but in and of itself, was not a sufficient ground to grant bail⁴. The grant of leave to appeal does not necessarily entitle an accused to be released on bail.⁵ The accused had to show that there was a real prospect of success in relation to the conviction and that a non-custodial sentence might be imposed. Thus, any further period of detention before the appeal is heard would be unjustified.
- [7] Furthermore, the prospects of success, on its own, would not constitute exceptional circumstances as the court must consider all the relevant factors to determine whether individually or cumulatively, they constitute exceptional circumstances which would justify the appellant's release.⁶ In assessing the prospect of success, it does not fall to the court considering the bail appeal to analyze the evidence extensively as it would not be appropriate to conduct a dress rehearsal for the appeal to follow.⁷

³ 2020 (1) SACR 329 (SCA) (18 December 2019)

⁴ *Rhode v S* at para [8] (this was the dissenting judgment)

⁵ *S v Masoanganye and Another*

⁶ *S v Scott- Crossley* 2007 (2) SACR 470 (SCA) at para [7]

⁷ *ibid*

[8] In *Masoanganye v S* the court found that the first appellant's personal circumstances indicated that he could hardly be considered a flight risk. However, it went on to hold that other factors such as the seriousness of the crime, the real prospects of success and the real prospect of receiving a non-custodial sentence were factors that also enjoyed prominence when considering an appeal against the refusal of bail.

[9] In considering this application, this court cannot ignore the fact that the approach to bail pending appeal in respect of certain serious offences has become less lenient and less liberty orientated.⁸

[10] The appellant argues that:

- (i) there was a failure of justice in terms of the Child Justice Act, Act 75 of 2008 (**'CJA'**) read with the Criminal Procedure Act, Act 51 of 1977 (**'CPA'**);
- (ii) the appellant was legally entitled to bail immediately or so soon as reasonably possible after his sentencing as he had an automatic right to appeal or review as he was a minor at the time the offences were committed;
- (iii) the prospects of success have increased since being granted leave to appeal against conviction and sentence on petition to this court; and
- (iv) the fact that the appellant's father is working in Spain does not result in him being a flight risk.

⁸ *S v Scott- Crossley* at para [6]

- [11] The appellant argues that he was vested with an automatic right of appeal in terms of section 84(2) of the CJA. Therefore, the fact that he applied for and was refused leave to appeal amounted to a failure of justice.
- [12] In support of this argument, the appellant relies upon the decision of *S v P.M*⁹ which held that a failure to transmit the matter on automatic review in terms of section 84 of the CJA resulted in the failure to deal with the criminal trial in terms of the CJA. This resulted in a serious miscarriage of justice which impacted not only on the administration of justice but also failed the child offender.
- [13] Reliance is also placed on the case of *S v SN and Another*¹⁰ wherein it was held that where the offender was under 18 years of age when he committed the offence, then his conduct falls to be judged within that context and that it would make no sense to treat such an offender as an adult when sentencing simply because the intervening passage of time resulted in the offender being an adult when sentencing is imposed.
- [14] In *S v P. M* the offender was 16 years old when he was arrested. In *S v SN and another* both accused were arrested when they were 17 years old.¹¹

- [15] Section 84 of the CJA provides that:

'84 Appeals

⁹ *S v P.M* (Review) (02/2023) [2023] ZANWHC 184; 2024 (1) SACR 1 (NWM) (5 October 2023)

¹⁰ *S v SN and Another* (SHE 59/14) [2015] ZAWCHC 5 (9 January 2015)

¹¹ The appellant also relied on the case of *J.A v S* (20190063) [2019] ZAECGHC 64 (3 Jun3 2019). As the accused was 16 years old at the time of the trial it cannot be disputed that the provisions of the CJS would be applicable thereto. However, it does not further the appellant's argument that the provisions of the CJA were applicable to his trial proceedings.

(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence-

(a) under the age of 16 years; or

(b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court: Provided further that the provisions of section 302 (1) (b) of that Act apply in respect of a child who duly notes an appeal against a conviction, sentence or order as provided for in section 302 (1) (a) of that Act.

(2) A child referred to in subsection (1) must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

[16] Section 84 of the CJA cannot be applied in a vacuum and must be read with section 4 thereof which sets out unequivocally to whom it applies.

[17] Section 4 of the CJA provides that:

‘4Application of Act

(1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and-

(a) was under the age of 12 years at the time of the commission of the alleged offence; or

(b) was 12 years or older but under the age of 18 years when he or she was-

(i) handed a written notice in terms of section 18 or 22;

(ii) served with a summons in terms of section 19; or

(iii) arrested in terms of section 20,

for that offence.

(2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa), in the case of a person who-

(a) is alleged to have committed an offence when he or she was under the age of 18 years; and

(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),

direct that the matter be dealt with in terms of section 5 (2) to (4)'

[18] In *S v S.N and Another* and in *S v P.M* the accused were younger than 18 years old when they were arrested and tried. Thus, they fall squarely within the ambit of section 4(1)(b) of the CJA rendering section 84 thereof applicable.

[19] In this matter, the appellant was not younger than 12 years old when he committed the offence nor was he under the age of 18 years when he was arrested for the offences for which he was convicted. It is clear from section 4 of the CJA that as the appellant was 25 years old when he was arrested and

appeared in court, the provisions of the CJA were not applicable to the conduct of his criminal proceedings in the lower court and section 84 of the CJA did not apply.

[20] During the hearing the appellant's legal representative was repeatedly invited to engage the court on the application of section 4 of the CJA to the facts of the case. Regrettably, she refused and/or failed to do so.

[21] It is not disputed that the prescribed minimum sentence of life imprisonment would have applied if the appellant had been sentenced as an adult. However, as he was a minor at the time the offences were committed, the prescribed minimum sentence was not applicable and he was sentenced to 8 years' direct imprisonment.

[22] The appellant further argues that the court *a quo* erred when it imposed a custodial sentence of 8 years' direct imprisonment as the CJA limited the custodial sentence which could be imposed to a period of 5 years.

[23] Sections 77(3) and (4) of the CJA provide that:

'(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276 (1)(i) of the Criminal Procedure Act.

[24] The offences of sexual assault and rape are contained in schedule 3. Therefore, the court *a quo*, even if it was sentencing the appellant as a minor, could have imposed a custodial sentence for a period not exceeding 25 years. The appellant's legal representative was invited to provide legal authority for the supposition that the maximum custodial sentence which could be imposed was 5 years. The court was referred to the Child Justice Amendment Act, Act 28 of 2019. Act 28 of 2019 does not amend section 77(4)(a) of the CJA to limit the maximum custodial period which could impose to 5 years. Therefore, it does not assist the appellant's case.

[25] In the circumstances, I find that there is no merit in the argument that there was a miscarriage of justice as a result of the failure to apply the provisions of the CJA to the criminal proceedings in the lower court, more particularly that the appellant was not afforded an automatic right of appeal in terms of section 84 of the CPA and that he was sentenced to a custodial sentence in excess of 5 years.

[26] The court *a quo* dealt extensively with the aspect of the appellant being a flight risk. In this excursion, the court *a quo* stated that the appellant failed to

deal with the fact that his father lives in Spain and that the father-son relationship has been maintained. The court *a quo* also recorded that the appellant and his family rejected the allegations of the complainant and the findings of the court. These were also the observations of this court. The court *a quo* also found that the appellant had no assets in the country and that he did not really have anything to keep him in the country.

[27] During the hearing great emphasis was placed on the close bond the appellant had with his mother, who was ill. As correctly pointed out by the state, no evidence was placed before the court detailing the nature and extent of the appellant's mother's illness. In the judgment convicting the appellant it is noted that the appellant's mother was willing to do anything to help her son. Subsequent to the hearing of the matter, the appellant produced affidavits which were not before the court *a quo*. There was also no application to place new evidence before the appeal court. In the circumstance, this court could not have regard to evidence which was not before the court *a quo*.

[28] In light of the above, it cannot be said that the court *a quo* erred in respect of its finding that the appellant was a flight risk. In any event, as stated in *S v Masoanganye and Another* even if the appellant was not considered a flight risk that would not be the end of the matter and the seriousness of the offence and the possible length of incarceration must also be considered.

[29] As stated above, the appellant was convicted of 2 counts of rape and 2 counts of sexual assault. The seriousness of these offences cannot be disputed. Similarly, it cannot be disputed that the appropriate sentence imposed in respect of these offences would be a substantial period of incarceration.

- [30] In turning to the merits of the conviction much is made of the fact that the complainant allegedly did not voluntarily complain of the rape. However, it is apparent from the record that the complainant freely and voluntarily and without any duress or pressure applied to her reported the rape. The hesitancy in identifying the perpetrator, which is understandable in the circumstances, is not the same as reporting the rape.
- [31] It is not disputed that the complainant was raped, this is also corroborated by the medical evidence. However, the appellant denies that he was the person who raped the complainant. In the trial proceedings there seems to be a suggestion that the complainant had a crush on the appellant and this was the reason she falsely accused him of rape.
- [32] In convicting the appellant, the court *a quo* evaluated and addressed all the evidence that was presented. The court *a quo* also made credibility findings and found the complainant to be a credible and believable witness. No legal basis has been presented for this court to interfere with those credibility findings.
- [33] In the circumstances, it cannot be said that the court *a quo* was biased in judging the bail application, that it did not act for substantial reasons or that it exercised its discretion capriciously or upon an incorrect principle.
- [34] Therefore, this court may not interfere with the court *a quo*'s decision, on the contrary it must defer to it. In the circumstances, the appeal against the refusal of bail pending appeal is refused.

H Slingers

11 March 2024