



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(VEREENIGING CIRCUIT COURT HELD IN PALM RIDGE)**

CASE NO: A68/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. ☐
	
SIGNATURE	<u>24 March 2021</u> DATE

In the matter between

NICHOLUS MANKALE RAMAROKA

APPELLANT

V

THE STATE

RESPONDENT

JUDGMENT ON BAIL APPEAL

THOBANE AJ,

[1] The appellant, appeals against the refusal of his formal bail application by the magistrate Ms Rapulana at Ekangala Magistrate Court on 29 December 2020.

[2] He is standing trial on a charge of rape. The allegation against him is that during the year 2020 the appellant intentionally and unlawfully committed an act of sexual penetration against the complainant a 12 years old girl by penetrating her vagina with his penis. As I understand things investigations were pending when the application was launched and still are.

[3] Absent from the transcript of the bail proceedings is the testimony of the first witness called by the respondent Sergeant Mabusha. His testimony however is comprehensively dealt with in the judgment by the magistrate. For purposes of this appeal, both counsel agree, the transcript as it currently stands is sufficient.

[4] The appellant did not give oral evidence but placed his circumstances before court by way of an affidavit. He is a South African citizen aged 27. He is married and has three minor children who reside with him at 767 Section F Ekangala, his parental home. He has been residing at that address for eight years. He has no passport or any other travel document. He has never been outside the borders of South Africa and has no relatives outside RSA. He is employed at MT Mabula and Son Transport, a company based in Ekangala.

He earns the sum of R5 000-00 per month and is the sole bread winner. His employment was confirmed by his employer Jerry Mtsweni whose affidavit was handed up.

[5] He indicated that he was a not a flight risk and undertook to attend court and stand trial. He stated that;

5.1. He has made no threats against anyone involved in the case;

5.2. He has received no threats;

5.3. His safety will not be compromised should he be released on bail;

5.4. The community will not be angered or disgruntled should he be released on bail;

5.5. He can not think of any reason why his release on bail will affect public safety, peace and order;

5.6. His release will not negatively influence criminal procedure, specifically bail legislation.

[6] He stated further that he cooperated with the police in that he handed himself over to the police. After his arrest he continued to give his cooperation to the police.

[7] He has no previous convictions and has no pending cases. His continued incarceration will cause him prejudice in that;

7.1. He will not be able to fully prepare for trial;

7.2. He will lose his employment which will have far reaching ramifications because he is the sole bread winner.

[8] Should the Court deem it appropriate to impose conditions, he is prepared to abide thereby. He is prepared to, should the Court so direct, report at his nearest police station. He offered an address of 12 Dark City as a place to where he can relocate so as to avoid contact with state witnesses, particularly the complainant, should the court determine that such a condition is warranted.

[9] The respondent called two witnesses who gave *viva voce* evidence. Sergeant Mabusha testified that he was 13 years in the SAPS. He was not the investigating officer but assisted Constable Malepe, the investigating officer, in the matter. He confirmed that the appellant did not have previous convictions. He confirmed his work address and his residential address. He testified that the accused's residence is less than two kilometers from the complainant's residence. In addition, that the complainant's grandmother is the next door neighbour of the appellant.

[10] In connection with the case he testified that the appellant was pointed out by the complainant as the one that raped her. Further that there were no DNA results. This is understandable because the dates on which the rapes are alleged to have been committed are unknown.

[11] He did not oppose the appellant's release on bail and indicated that the complainant's mother was also of the view, according to a statement she made, that the appellant "might be released from custody". It later turned out that the statement was neither signed nor dated.

[12] The investigating officer Detective Constable Thabo Malepe was called as the second witness. He confirmed in the main all the personal circumstances of the appellant. He testified that he differed with the posture adopted by Sergeant Mabusha, that of not opposing bail. He proceeded to advance the following reasons;

12.1. There is an outcry by the community, especially in GBV cases, who accuse the police of not doing their work. He is opposing bail so that the community can see that police are working;

12.2. Because the victim is 12 years old and can not protect herself and because he is not sure if her parents can defend her, he is stepping up. In addition he is moved by media reports on GBV and decided that the police should do something;

12.3. The child alleges that she was raped six times over a period of time starting in 2019, although she does not disclose any dates;

12.4. The accused is the neighbour to the victim's grandmother, whom she frequently visits;

12.5. That there is a possibility that the accused can threaten the victim.

[13] The offence of which the appellant is charged is an offence listed in Schedule 6 to the Criminal Procedure Act, 51 of 1977. The appellant therefore had to persuade the *Court a quo* on a balance of probabilities that exceptional circumstances exist which are permissive of his release on bail. Among other tools at the court's disposal is an assessment of the strength of the State's case, which I believe is germane to an enquiry as to the existence of exceptional circumstances. (See **S v Kock**¹).

[14] In her Judgment the magistrate does not make any assessment of the strength or otherwise of the State case. Had she done so, she would have become aware that;

14.1. The evidence against the appellant is that of a single witness, therefore the evidence is to be approached with caution;

14.2. The single witness is a minor, therefore further caution is called for;

14.3. The rape incidents are said to have taken place over a period of time with no specific dates, thus making them difficult to prove;

14.4. There is no DNA evidence linking the appellant to the commission of the crimes;

14.5. That outstanding or pending investigations only pertain to an interview of the victim by a Social Worker and that there is no evidence

¹See in this regard: *S v Kock [2003] 1 ALL SA 551 (SCA)* at par 15 (11 i – 12 b) and cases cited there.

that such a report will significantly advance investigations or result in the obtainment of further and better evidence, it being *ex post facto*.

[15] In my view, had the magistrate assessed the strength or weakness of the State case, she then would have concluded that the State case against the appellant was weak. In the context of s 60(11)(a) of the Act, the strength of the State case has been held to be relevant to the existence of ‘*exceptional circumstances*’². In **S v Kock** (*supra*) the following is said at paragraph 15;

“When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt. The case presented to the court of first instance fell into the second category. That should have been an important factor in the magistrate’s evaluation of the application. Because of her misdirection no proper attention was paid to it.”

[16] In the course of a bail application the magistrate need not make a finding, even on a provisional basis, as to the guilt or innocence of an applicant for bail. All the Court has to do is to weigh the *prima facie* strength or weakness of the State’s case and such a decision ought not to be made with regard to credibility findings in order that bail proceedings do not become a dress rehearsal for the

²See *S v Botha en 'n Ander 2002 (1) SACR 222 (SCA)* at para [21], *S v Viljoen 2002 (2) SACR 550 (SCA)* at para [11]

trial itself³. I conclude that the Court *a quo* misdirected itself in that it failed to weigh, on a *prima facie* basis, the strength and weakness of the State case.

[17] Constable Malepe testified and opined as follows about the threat posed by the appellant⁴;

“Due to the fact that the child and the accused person see each other frequently, so it might happen that the accused person might threaten the child or looking at the fact that there are men who rape and kill children, so I am not satisfied that the accused person should be released on bail.”

[18] In her judgment, the magistrate summarises the testimony of Constable Malepe and says *inter alia* the following⁵;

“He further said that the victim frequently visits her grandmother, which (sic) is your next door neighbour, and also that you may intimidate the victim, the reason being that the social worker’s report is still outstanding.”

[19] It is self evident that the summary by the magistrate is not accurate. The investigating officer was simply speculating and stated that “*it might happen*” that the accused “*might*” threaten the child. He offered no evidence on which the basis for his speculation is founded. I have great difficulty accepting an expressed possibility without any foundational basis or what informs it.

³ *S v Van Wyk 2005 (1) SACR 41 (SCA)*

⁴ Page 33 line 5-10 of the record.

⁵ Page 62 line 18-21 of the record.

[20] The testimony of Constable Malepe intimated that a Social Worker's report was outstanding and that the victim needed to be interviewed by the Social Worker. This is the only investigation which was said to be outstanding. In her judgment, the magistrate seems to have linked the alleged apprehension by the investigating officer with the outstanding Social Worker's report, as well the fact that the victim might be relaxed in the presence of Social Workers, were the accused to be in custody when the interview is conducted. The Court concludes, without evidence, that the child would not be free when a Social Worker interviews her, if the accused is out on bail⁶. This Court as the upper most guardian and keeping in mind the interest of the child directed questions to the parties to establish if the interview has taken place. I have been informed that it has. To the extent that the appellant's release would have impacted the procurement of the report, that is no longer a concern.

[21] It seems the Court *a quo* was concerned, correctly in my view, that the victim may come into contact with the appellant. The appellant in his application had tendered an alternative address to which he was prepared to relocate. He also gave an indication of his preparedness to abide by bail conditions were they to be imposed. The magistrate did not evaluate the viability or otherwise of imposing any conditions. This was a misdirection.

⁶ Page 65 line 22-24, "*My view is that this child needs to be free and not fearing that you are out you do some harm to her. We need that the statement be obtained.*"

[22] The magistrate was at pains to observe that the affidavit tendered by the accused did not mention exceptional circumstances. She further observed that it appeared the affidavit was prepared with a Schedule 5 mindset, among others because where the affidavit mentioned Schedule 6, it seemed to her the 5 was written over to make it appear as a 6, with a pen. I am of the view that it matters little how the affidavit is couched and whether there were corrections thereon. What is of critical importance is that at the commencement of the bail application, appellant's legal representative confirmed that the bail application was on the basis that the appellant is facing a Schedule 6 charge. In addition, when the appellant's legal representative addressed Court at the close of the State case, he submitted that the appellant bore the onus to show that exceptional circumstances were present. What matters the most is whether the appellant advanced factors which meet the yardstick set by legislation and case law.

[23] This Court must determine whether the appellant was able to prove the existence of exceptional circumstances within the meaning of Section 60(11)(a) of the Criminal Procedure Act, 51 of 1977, before the Court *a quo*. In order to establish whether the appellant did discharge this onus, the magistrate was constrained to determine whether on the facts of the case, the

circumstances placed before her can be said to be “exceptional”. This entailed the making of a value judgment on the part of the magistrate⁷.

[24] The appellant placed certain facts which were not challenged by the respondent and which the magistrate did not take into account or if taken into account are not referred to in her judgment;

24.1. That he is not a flight risk and intends standing trial;

24.2. That he co-operated with the police and that he in fact handed himself to the police;

24.3. That he will not interfere with witnesses, save for the part relating to the Social Worker and the fact that the victim needed to be “relaxed” which is not derived from facts nor is it rationalised;

24.4. That his release may cause public disorder, endanger the public or even the accused and will undermine public peace;

24.5. That any concerns the State has can be addressed by the imposition of appropriate bail conditions;

24.6. That evidence suggests that the rape incidents took place over a period of time and that there is paucity of detail;

24.7. The strength or otherwise of the state case.

[25] In summary, before the Court *a quo* was the appellant against whom there was no assessment of the strength or weakness of the state case; there was

⁷ *S v Porthen and others* 2004 (2) SACR 242 (C)

no well-grounded reason to believe that he will influence state witnesses particularly the victim pending the trial or will abscond and thus remove himself from the oversight of the authorities; that formulation of appropriate bail conditions would address concerns about possible contact with the victim. I am of the view that the facts placed by the appellant before the magistrate, when considered cumulatively bearing in mind the state case, are exceptional. I conclude that the magistrate wrongly refused the release of the appellant on bail. The appeal must therefore succeed.

[26] I therefore make the following order;

26.1. The appeal is upheld;

26.2. The order of the Court *a quo* is set aside and replaced with the following:

26.2.1. Bail is granted to the appellant in the amount of R5000.00 (five thousand Rand) on the following conditions:

- (i) that he appears personally in the Magistrate's Court or Regional Magistrate's Court in Ekangala on such times, dates and places to which the criminal proceedings may from time to time be adjourned until the conclusion of the said proceedings;
- (ii) that he relocates to 12 Dark City Section A, Ekangala, and reside at that address until conclusion of his trial and

(iii) that he shall not directly or indirectly interfere with or contact any of the state witnesses or any member of their families, either personally or via a third person.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

ON NEHALF OF THE APPELLANT : ADV. ROETS

ON BEHALF OF THE RESPONDENT : ADV. MARITZ

DATE OF JUDGMENT : 24 MARCH 2021

MANNER OF DELIVERY:

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 09h34 on 24 March 2021.