REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A74/2021
REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:NO
DATE:22/4/2021

In the matter between:

JAYANDRAN PILLAY Appellant

and

THE STATE Respondent

JUDGMENT

MOKOSE J

[1] This is an appeal against the judgment of Ms Pretorius of the Magistrates' Court sitting at Tsakane, handed down on 15 October 2020,

refusing to admit the appellant to bail pending the finalisation of criminal proceedings against him. The notice of appeal was filed out of time on 25 March 2021. However, it was accompanied by a condonation application which was unopposed bythe respondent and granted.

[2] The appellant, who was duly represented when he applied for bail, has been charged with one count of rape in terms of the provisions of Section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 read with the provisions of Sections 51 and 5 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended as well as Sections 92(2) and 94 of the Criminal Procedure Act Procedure Act 105 of 1977 ("the CPA").

[3] It is alleged in the charge sheet that the appellant unlawfully and intentionally committed an act of sexual penetration with D R[…], a mentally disabled person of 51 years, on 24 September 2020 at or near Geluksdal in Ekhurhuleni South East by inserting his penis into her vagina and anus without her consent. Based on this averment, the bail application was dealt with in the ambit of Schedule 6 of the Criminal Procedure Act.

[4] Appeals from the lower court are dealt with in terms of Section 65(1)(a) of the CPA. The section provides:

> ***"S65 APPEAL TO SUPERIOR COURT WITH REGARD TO BAIL***
>
> *(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to boil or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.*

……

(4) 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 in its or his opinion the lower court should have given."

[5] The appeal on hand turns on the question of whether or not the bail application should have been determined in terms of Schedule 5 or Schedule 6. The appellant is of the view that the State did not act in terms of Section 60(11A) of the CPA as it did not prove that the offence with which the appellant was charged is a Schedule 6 offence and that Section 60(11)(a) is applicable. In particular, the allegation that the victim, who is not the complainant, is mentally disabled, is placed in dispute. The appellant was of the view that for the Magistrate to appreciate whether the bail application is one that resorts under Schedule 5 or 6 in the absence of a Section 60(11A) certificate, he must be satisfied whether the alleged victim falls within any one of the categories of a person who is mentally disabled as described in the Sexual Offences Act hereinafter. In the absence of any proof of the victim's mental disability and in the absence of a certificate in terms of Section 60(11A) the appellant is of the view that there has been a misdirection of the law and accordingly, this court must interfere. He would be entitled to have the matter adjudicated *in favorem libertatis.*

[6] Firstly, the court needs to determine whether the court *a quo* was wrong in holding that the charges that the appellant faced fell within the ambit of Schedule 6 without the State having presented written confirmation to that effect. The charge sheet states that the accused is charged with contravening the provisions of Section 3 of Sexual Offences Act on a 'mentally disabled person'. The provisions of Schedule 6 of the CPA define rape as follows:

"Rape or compelled rape as contemplated in Section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively -

(a) .....

(b) Where the victim-

……..

(iii) is a person who is mentally disabled as contemplated in Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c)……..

[7] A mentally disabled person is described in the definitions clause of the Sexual Offences Act as follows:

***"'Person who is mentally disabled'** means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was-*

(a) unable to appreciate the nature and reasonable foreseeable consequences of a sexual act;

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;

(c) unable to resist the commission of any such act; or

(d) unable to communicate his or her willingness to participate in any such act."

[8] Section 60(11A) of the CPA provides, *inter alia,* that at any time before an accused plead s to the charge, the attorney-general may issue a written confirmation that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

[9] I note that after it had been decided that the charge fell within the ambit

of Schedule 6, no issue was raised by the appellant with the State to present the written confirmation in terms of Section 60(11A) as it was obliged to prove that the victim was mentally disabled. This was only brought up in the hearing in respect of the bail appeal for the first time. Had the appellant brought up this issue, the provisions of Section 60(11A)(c) would have come into operation and the State would have been obliged to furnish such confirmation or at least an indication when it would be furnished.

[10] Accordingly, I come to the conclusion that the Magistrate was not at fault in proceeding with the bail application on the basis that it fell under the ambit of Schedule 6. Furthermore, I am of the view that the State was well within its right to send the victim for an assessment with the Teddy Bear Clinic as it had done. Accordingly, Section 60(11) became applicable .

[11] Section 60(11) provides that :

> *"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.*
>
> (b) *In Schedule 5, but not 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 the interests of justice permit his release".*

[12] In terms of Section 60(11) the onus falls upon an applicant to adduce evidence which would satisfy the court that exceptional circumstances exist in the interests of justice which would permit his or her release on bail. The

Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*[1] stated the following pertaining to exceptional circumstances:

> *"[75] An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent ....*
>
> *[76] ... In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance , an accused charged with a Schedule* 6 *offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case …".*

[13] In discharging this onus, the appellant submitted an affidavit in which he confirmed his place of residence, that he is employed and confirmation of his earnings. Furthermore, he confirmed that he has no previous convictions and outstanding cases. He undertook that should he be released on bail, he would not endanger the safety of the public or a particular person or commit any offence; he would not evade his trial; he would not attempt to influence or intimidate any witnesses nor conceal or destroy any evidence; and would not undermine or jeopardise the objectives of the proper functioning of the criminal justice system.

[14] However, during argument, Mr Pooe, for the appellant, argued that the State's case is weak and based this argument on the fact that there was no certainty of the victim's mental capability at the time of the bail application and that it was a mere averment that the victim was mentally disabled. This, he argued, should be regarded as an exceptional circumstance which should have

[1] 1999 (4) SA 624 (CC) at paragraphs 75 - 76

enabled the court to find that the appellant had discharged the onus that rested on him. Accordingly, bail should have been granted. The appellant had given evidence in the form of the affidavit he submitted in support of his bail application . Such evidence was not open to being tested by cross-examination and was as such, less persuasive.[2]

[15] Mr Pooe further contended that the intercourse between the victim and the appellant was consensual. Furthermore, the victim and the appellant are lovers. I note from the affidavit that there was no mention that the appellant disputes sexual intercourse. It is silent on this point. The affidavit read as follows:

> *"12. Submissions regarding the offence:*
>
> *I have been advised by my legal representative that I have the right to remain silent and that should I decide to made a statement or disclose my defence that the statement I make may be used against me in the forthcoming trial should the matter proceed to same. I know that in terms of a [sic] South African constitution I am envisaged to be innocent until proven guilty. I deny any involvement by myself during the commission of this offence as alleged by the state against me, however would like to state that I intent [sic] pleading not guilty to the charges against me and elect my right to remain silent in respect of the merits of this matter."*

[16] It is evident that Mr Pooe's submissions were made from the bar and not by the appellant. This evidence could also not be tested in cross-examination and was also not under oath.

[17] In S v Botha en 'n ander[3] the court held that in the context of s 60 (11) (a) of the CPA, the strength of the State's case has been held to be relevant to the existence of 'exceptional circumstances'. A weak state case will not necessarily result in the granting of bail. On the other hand, a strong state case will not necessarily result in the refusal of bail.

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[2] S v Pienaar 1992 (1) SACR 178 (W) at 180H

[18] In the case of S v Mathebula[4] it was stated that:

"[12] But 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: S v Botha en 'n ander 2002(1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own was and not expect to have it cleared before him. This 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: S v Viljoen at 561 f-g".

[19] It is trite law that the court can only interfere with the decision to refuse bail if it is found that the decision of the court *a quo* was wrong.[5] However, the court in the matter of S v Porthen and Others[6] expressed the view that interference on appeal was not confined to misdirections in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him in terms of Section 60(11)(a) of the CPA.

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[3] 2002 (1) SACR 222 at para 21
[4] 2010 (1) SACR 55 (SCA)
[5] S v Barber 1979 (4) SA 218
[6] 2004 (2) SACR 242 (C)

[20] In conclusion and as I have stated above, Section 60(11A) enables the attorney-general at any time before the accused pleads and irrespective of what charge is noted on the charge sheet, to issue a written confirmation to the effect that he is intending to charge the accused with an offence which falls within the purvey of Schedule 5 or 6 and that such written confirmation be handed in to court. Furthermore, the Magistrate was not obliged to make a determination at the bail hearing whether the State had proof on a balance of probabilities that the victim was suffering from a mental disability or not. This will be determined at the trial.

[21] Therefore, in view of the fact that no evidence was adduced to show that the Magistrate had misdirected herself, I am satisfied that she had correctly assessed the totality of the evidence on a balance of probabilities in coming to the decision to deny the appellant bail.

[22] Accordingly the appeal should fail.

[23] In the result, the order I make is that the appeal against the order of the court *a quo* to refuse to admit the appellant to bail is dismissed.

MOKOSE J
Judge of the High Court
of South Africa
Gauteng Division,
Pretoria

For the Appellant:

Adv CE Thompson instructed by

AKA Attorneys Inc

For the Respondent:

Adv Pruis instructed by

The Director of Public Prosecutions

PretoriaJudge of the High Court

Date of Hearing: 9 April 2021

Date of Judgement: 22 April 2021