

**IN THE HIGH COURT OF SOUTH AFRICA,
[GAUTENG DIVISION, PRETORIA]**

CASE No. A 397/2019

APPEAL no: BA 03/19

15/1/2020

In the matter between:

FANHEE BASADIEN

APPELLANT

And

THE STATE

RESPONDENT

Judgment

Mavundla J.

- [1] This is an appeal against the decision of the Magistrate Mr Kruger in the Magistrate Court district of Tshwane East held in Cullinan on the 29 July 2019 refusing to admit the appellant to bail pending the finalization of his case.
- [2] The appeal is noted on the basis that the magistrate erred:
- 2.1 in finding that exceptional circumstances in terms of section 60(11)(a) of Act 51 of 1977 were not established notwithstanding that:
- 2.1.1 no evidence was presented which could indicate a likelihood

- that the appellant if released on bail would attempt to evade standing trial;
- 2.1.2 No evidence was presented which could indicate a likelihood that the appellant if released on bail would interfere with witnesses or evidence;
 - 2.1.3 no evidence was presented which could indicate a likelihood that the appellant if released on bail would commit schedule 1 offence or would endanger the public;
- 2.2 in failing to hold that the aforesaid circumstances cumulatively amounted to exceptional circumstances;
 - 2.3 in failing not to analyse the totality of evidence in relation to factors outlined in section 60(4)(a) -(e) of Act 51 of 1977;
 - 2.4 in failing to consider granting bail coupled with appropriate conditions;
 - 2.5 in failing to attach any sufficient weight to the appellant's previous conduct while on bail, namely that he never failed to comply with his to obligation to attend court;
 - 2.6 by misdirecting himself in overemphasising the strength of the State's case;
 - 2.7 in failing to attach weight to the appellant's evidence under oath that his willing to relocate to an alternative address provided for at [...] until the matter is finalized;
 - 2.8 in failing to attach weight to the appellant's evidence under oath that he is a South African citizen without a valid passport as it had expired and that he had handed it over to the South African Police;
 - 2.9 in overlooking the fact that the investigating officer Mr Segone testified that the offence happened on 29 June 2019 while the charge sheet indicated that the offence happened on 25 June 2019 which is a very material mistake and he placed much emphasis on such evidence;
 - 2.10 by incorrectly refusing bail.

- [3] The appellant is being charged with 3 (three) counts of rape¹ and one count of intimidation. The rape charges fall within the purview of s 60 (11)(a) of the Criminal Procedure Act 51 of 1977,² which enjoins the presiding officer to keep the appellant in custody unless the appellant/ accused satisfy him that there exists exceptional circumstances which in the interest of justice permit that he be released on bail.
- [4] The *onus* rested on the appellant to prove the existence of exceptional circumstances which permit that in the interest of justice he be admitted to bail. Such *onus* had to be proven on a balance of probabilities.³
- [5] The appellant deposed to an affidavit in his bail application. His level of education is grade ten. He disclosed the three aforesaid addresses. He has two wives, one in South Africa with whom he has five children and a second wife who resides in Senegal with whom he has two children. His income is derived from selling goods which he buys in China. He last travelled to Sengal in 2015. He last travelled to China in 2018. His passport expired on 28 June 2019. He disclosed his previous convicts; one of theft in 2000 where he was sentenced to 6 (six) months imprisonment wholly suspended for a period 5 years; and unlawful possession of firearm in 2002 in respect of which he was sentenced to 24 (twenty-four) months imprisonment. He indicated that he intended to plead not guilty to all the counts. He did not deal with the merits of the case. He further stated that he can afford posting an amount of R1500. 00 towards bail.

¹ in contravention of s3 of Sexual Offences Related Matters Amendment Act 32 of 2007 read with. inter alia, sections 1, 56(1). 57, 58 59. 60 and 61 of the Sexual Offences Related Matters Amendment Act 32 of 2007, read with section 92(2). 94. 256 and 28 1 of the Criminal Procedure Act 51 of 1977 and the provisions of s51(2) and Schedule 2 of the Criminal Law Amendment Act 38 of 2007.

² Schedule 6 of the Criminal Procedure Second Amendment Act 85 of 1997, which amended s 60 (11) of the Criminal Procedure Act 51 of 1977 (hereinafter the Act ') provide s as follows:

Section 60(11) as amended reads as follows:

'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.'

³ S v Jonas 1998 (2) SACR 677 at 678h- l and 679g-h. S v Schietekat 1999(1) SACR 100 h

[6] The State in opposing the bail application, relied on the evidence of the investigating officer constable Segone. According to the instigating officer, the complainant was invited to the appellant's home by his wife who is the complainant's aunt. The rapes and the intimidation offences were allegedly committed at the appellant's home within a space of less than twenty-four hours. After the complainant had left the appellant's home, she reported her ordeal to her mother, who is the sister to the appellant's wife. A criminal case against the appellant was immediately laid with the police. When the appellant was arrested, a firearm was found underneath a pillow on his bed. The appellant's expired passport was handed in. His addresses in Cape Town, [...] and [...] were verified. The said facts were adduced through the evidence of the investigating officer.

[7] The magistrate in refusing the appellant's bail had regard to the following:

- 7.1 that the State's case is strong, regard being had to the fact that there are three counts of rape and the possible sentence that might be imposed;
- 7.2 the appellant at the time of arrest was uncooperative to the investigating officer;
- 7.3 was in possession of a firearm at the time of arrest;
- 7.4 had a previous conviction of unlawful possession of a firearm;
- 7.5 the appellant threatened the complainant after the commission of the crime;
- 7.6 there was a question mark regarding the appellant's permanency and trustworthiness,
- 7.6 both the complainant and the appellant's wife are scared of him;
- 7.7 appellant mislead the court that he last went to Senegal in 2015 whereas the passport reveals that he went there three times in 2017.

[8] It was submitted on behalf of the appellant that for purposes of establishing

exceptional circumstances, he had proven the following (a) the degree of permanency in the RSA; (b) the family ties within the RSA; (c) less to interfere with witnesses and police investigations, (d) regardless of having a wife and children outside the borders of RSA, but a less likelihood to abscond especially in the light that his current travelling documents has expired; (e) he has proven (i) existence of a positive and confirmed addresses by the investigating officer; (ii) less likelihood that the interest of justice will be compromised were he to be released on bail.

[9] It was further submitted that the State did not disprove the above mentioned factors established by the appellant. The magistrate was duty bound to weigh the interest of justice that the appellant must be released on bail; in this regard relying on the authority of *5 v D* 2012 (full citation not provided). It is further submitted that the test the magistrate might have used in determination of bail might be incorrect and that had he used the correct test he would have admitted the appellant to bail; in this regard relying in the matter of *S v Rudolph*.⁴

[10] It is correct that when deciding the issue whether an accused should be released on bail or not the court should have regard not only to the interest of justice but also the persona circumstances of the accused person, weighing the interest of justice against the right of the accused to his personal freedom and in particular the prejudice he or she is likely to suffer if detained in custody; *vide* s60(9) read with s60(4). In this regard the period of the accused person in custody since the arrest, the possible duration of the trial while in custody. and the possible financial loss the person might suffer while held in custody, his health., etc. The list is inexhaustive.

[11] It was further submitted that the magistrate only concentrated on the strength of the State's case but left out other issues, such as that the *prima facie* evidence upon which the strength of the State's case is premised, will still be tested during the trial. The appellant must be seen as innocent until proven guilty. There was no evidence that there is a likelihood that the appellant

would evade trial and or interfere with the State witnesses. The court should; have learned in favour of granting bail, as held in *S v Branco*⁵, The magistrate should have been guided by the decision in *5 v Anderson*⁶; *S v Hudson*⁷; *Baily and Others v The State*⁸.

[12] It was further submitted that the magistrate erred in exercising his discretionary power in the wide sense of discretion. The appellate court is in terms of s65(4) of the CPA enjoined to interfere with the lower court's decision of a bail application if it is satisfied that the lower court's decision was wrong. *In casu* the magistrate found that the appellant did not discharge the *onus* resting on him; the court on appeal should assess the evidence that was placed before the magistrate and come to the conclusion that the appellant did in fact discharge the *onus* and substitute its own decision and admit the appellant on bail.

[13] The appellant chose to exercise his right of silence, as he is entitled to, and placed no evidence to refute the State's case regarding the commission of the alleged offences. He further did not place evidence to refute the State's version that he intimidated the complainant with a firearm. He did not refute the evidence that both the complainant and his wife were afraid of him. This invariably leaves the contention of the State, that it has a strong case against the appellant⁹ and on inferential basis that he might cause the complainant harm once released on bail, undermining the proper functioning of the criminal system. As held in *S v Rudolph*¹⁰ in those circumstances s60(4)(a) and (d) of the Act prohibits his release from detention. It is apposite to quote all of s60(4):

'The interest of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were

⁴ 2010(1) SAC R 262 (SCA).

⁵ 2002 (1) SACR 531 at page 533.

⁶ 1991 (1) SACR 525 CJ at 5278 -G.

⁷ 1996 (1) SAC R 431 (W) at 434 AD.

⁸ [2013] ZAKZ 72 at para graph 29.

⁹ *Vide K v S* 2003 [1] ALL SA 551 SCA at 555 para (15)

released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or[sic].¹¹ In this *Rudolph*¹¹ case the Supreme Court of Appeal held that: '[16] When all the allegations are weighed up at least two of the grounds listed in s60(4) have been established. In those circumstances the release on bail of the appellant is not permitted. The court a quo was therefore correct in upholding the refusal of bail by the magistrate.'

[14] In this matter, the State's case was premised on the *viva voce* evidence of the investigating officer constable Segone, whose evidence was tested under cross examination. The appellant chose to rely on his affidavit, and as such his evidence was not open to cross examination and not tested. But besides, there was no defence proffered. Accordingly, where the *onus* rest on the appellant in a bail application, his untested evidence is not sufficiently persuasive to off- set the strength of the State's case and prove on a balance of probability that he will be acquitted on trial. As held in *S v Mathebula*¹² until

¹⁰ [2010(1) SACR 262 (SCA) at 267e-h.

¹¹ *Supra* at 268a-h.

¹² 2010 (1) SACR 55 (SCA) at p59 b-g.

an applicant in a bail application has set up a *prima facie* case of prosecution failing in proving his guilt, the State was not obliged to rebut his evidence to that effect. In my view, the Mathebula decision (*supra*) is dispositive of the submissions made on behalf of the appellant that there was no evidence lead that there was a likelihood of the appellant not standing trial, interfering with the witnesses, and that the magistrate erred in finding that there were no exceptional circumstances.

- [15] The personal circumstances of the appellant were placed on record through his affidavit; *vide* paragraph [5] *supra*. He proposed to post an amount of R1500. 00. His personal circumstances are not extraordinary but the general circumstances in bail application. He is facing serious counts, if found guilty he risks a long imprisonment terms. He also has a wife in Senegal although his passport has expired. The magistrate was aware of all these factors. The magistrate concluded that the appellant was a flight risk. He also accepted the evidence of the investigating officer, and concluded that the appellant was a dangerous person. He concluded that the appellant did not satisfy him that there were exceptional circumstances warranting that he be admitted on bail.
- [16] Indeed the result, I am unable to find that the magistrate was in any way wrong in finding that the appellant had not proven that there were exceptional circumstances in this case.
- [17] Accordingly the appeal is dismissed.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 09/01/2020

DATE OF JUDGMENT : 15/01/2020

APPELLANT'S 'S ADV : ADV MAHAPA THIPE

INSTRUCTED BY : KABINDE ATTORNEYS.

RESPONDENT'S ATT : ADV MPHAHLELE

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