

REPUBLIC OF SOUTH AFRICA



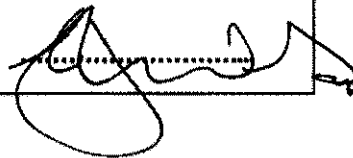
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO.: A144/17

7/4/2017

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

7/4/2017



In the matter between

JAN BAFANA HLABATHI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This appeal is directed at the refusal of the honourable Regional Magistrate, Mr Moloto, of the Regional Court, Pretoria, to grant bail to

the appellant. The State opposed the bail application in the court *a quo* and opposes this appeal.

[2] The following facts are common cause:

- (a) The offences with which the appellant are charged include *inter alia* offences stipulated in Schedule 6 of the Criminal Procedure Act, Act 51 of 1977 (the Act);
- (b) The accused, including the appellant, are facing fourteen charges, which include nine counts of rape, two counts of robbery and two counts of kidnapping. The rape being so-called gang rape;
- (c) The case against the appellant and his co-accused commenced approximately 6 years ago. The trial is to proceed on 31 March 2017;
- (d) Prior to the commencement of case against the appellant, there was apparently an application for bail, which was refused. The records of that application are no longer available;
- (e) The appellant has been in custody for approximately 6 years;
- (f) The trial has now reached the stage where the State has closed its case and the accused (including the appellant) are to present their defences to the charges against them.

[3] It is further common cause between the parties that in view of the fact that the provisions of Schedule 6 of the Act apply, the appellant is to show that exceptional circumstances exist, which in the interest of justice, permit his release on bail.¹

¹ S 60(11(a) of the Act

- [4] Further in that regard, the appellant bears the onus to adduce evidence, and hence to prove to the satisfaction of the court, that existence of exceptional circumstances are of such nature as to permit the release of the appellant on bail.²
- [5] It is trite that the meaning and interpretation of what constitutes "exceptional circumstances" are wide-ranging. It is a concept indicative of something unusual, extraordinary, remarkable, peculiar or simply different from the norm.³
- [6] The appellant chose to put his case in respect of his application for bail before the court *a quo* in affidavit form. In that affidavit the circumstances upon which the appellant relies, which were repeated in the appeal, are the following:
- (a) The appellant has been in custody for a period of approximately 6 years;
 - (b) The appellant would not be a flight risk, he has a fixed address and would live with his parents;
 - (c) If not let out on bail, he would remain incarcerated indefinitely;
 - (d) He has not been found guilty yet and remains innocent;
 - (e) The appellant has no previous convictions and there are no pending cases against him;
 - (f) The appellant further undertakes to honour any bail condition that may be imposed;

² *S v Petersen* 2008(2) SACR 355 (CPD) par [54]

³ *op cit.* par [55] – [56]

- (g) The appellant has no financial links or capabilities outside the borders of the Republic.

It was submitted on behalf of the appellant in argument, that the first four circumstances referred to above, represent exceptional circumstances. In my view there is no merit in the said submission for what follows.

- [7] The record clearly indicates that all parties involved, and privy to the trial proceedings, bear blame for the matter not being finalised sooner. Counsel for the State submitted that at best for the appellant it is a neutral factor. I agree.
- [8] The submission that the appellant has a constitutional right to his freedom is fettered by the provisions of s 60(11)(a) of the Act. The mere fact that the appellant has not yet been found guilty is of no consequence in view of the fact that the trial has commenced and has reached the stage where the State closed its case. It depends on the appellant to present evidence of his defence. No version as to the appellant's defence has been put before the court *a quo*. The submission of Mr Steenkamp on behalf of the appellant that the State has not presented the strength of the State's case against the appellant is opportunistic. It is for the appellant to show whether there is a strong or weak case against him.⁴

It is to be recorded that Mr Steenkamp does not appear on the appellant's behalf in the trial before the court *a quo*. The appellant has another attorney who represents him in the trial. Mr Steenkamp only represents the appellant in the bail application.

⁴ *S v Maja et al* 1998(2) SACR 677 (SEC); *S v Jonas* 1998(2) SACR 677 (SEC)

- [9] It has been held by the courts that a possible exceptional circumstance would be independent evidence of innocence.⁵ In this regard, the appellant has given no indication what the strength or weakness of the State's case is. That has not been put up, but for a submission that the investigating officer has placed nothing before the court in that regard. That submission smacks of arrogance where the appellant bears the onus to prove exceptional circumstances.⁶ The State has closed its case. It is up to the appellant to put his defence forward. He has failed to do so. There is no independent evidence of innocence.
- [10] A possible exceptional circumstance relating to compelling reasons of health is not relevant, the appellant clearly indicating that he is healthy.
- [11] Objectively considered, the possibility of flight risk is more imminent than at the stage prior to the trial commencing. The appellant has heard the state case against him. Only he knows his defence. He is the only person who could evaluate the case against him. If it is strong, the risk to take flight is greater. The appellant is well aware of the sentences should he be found guilty. The appellant's mere saying that he is no flight risk, runs hollow in the absence of any indication of the weakness of the State's case.
- [12] Mr Steenkamp has criticised the honourable Regional Magistrate for not considering various alleged new facts and for not dealing with each one. Some criticisms also relate to the non-considering of the provisions of s 60(4) of the Act. I agree with counsel for the State that such consideration only comes to bear once it has been established that exceptional circumstances exist. In my view, the criticisms levelled against the honourable Regional Magistrate have no substance and are without merit. The honourable Regional Magistrate dealt comprehensively with the issue of exceptional circumstances.

⁵ *S v Mohammed* 1999(2) SACR 507 (C)

⁶ *S v Mathebula* 2010(1) SACR 55 (SCA) par [12]

[13] It follows that the applicant has failed to prove exceptional circumstances that would warrant the granting of bail at this stage of the proceedings.

[14] I am obliged in terms of the provisions of s 65(4) of the Act not to set aside the decision against which the appeal is brought, unless I am satisfied that the decision was wrong.

[15] In view of all of the foregoing, I cannot find that the honourable Regional Magistrate's decision is wrong.

[16] It follows that the appeal cannot succeed.

I grant the following order.

The appeal is dismissed.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Appellant: A Steenkamp
Instructed by: Andre Steenkamp Attorneys

On behalf of Respondent: Wilsenach
Instructed by: The State