



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1493/17P

In the matter between:

DARREN MARC GODDARD

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Delivered on: 27 March 2017

MNGADI AJ

- [1] The appellant appeals, in terms of s 65(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA'), against the decision of the magistrate of the Pietermaritzburg Magistrates' Court refusing the application for the release of the appellant on bail, pending the outcome of the criminal proceedings against him. The appellant, having been arrested on 25 June 2016, applied for bail on 18 July 2016 before the learned magistrate to be released pending his criminal trial ('the first bail application'). The learned magistrate refused the application. The appellant thereafter appealed the decision of the magistrate

and on 6 September 2016 this court (per Chili J) dismissed the appeal ('the first bail appeal').

- [2] On 21 October 2016 the appellant instituted another application before the magistrate to be released on bail ('the second bail application'). It was claimed that there were new facts entitling the appellant to bring an application for his release on bail. The learned magistrate, having heard the matter, refused the second bail application. The appellant appeals against the refusal to grant bail in the second bail application, and this is what now lies before this court.
- [3] In the first bail application the state placed before the magistrate four charges against the appellant. The contents of the charges were supplemented by an affidavit deposed to by the investigating officer. Counts 1 and 2 relate to alleged contraventions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act') read with the provisions of ss 51 and with schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). In count 1 it is alleged that on an unknown date at Scottsville in Pietermaritzburg the appellant committed an act of sexual penetration with a 9 year old complainant (N), by inserting his genital organ into the genital organ of the complainant. In count 2 it is alleged that on an unknown date at Scottsville in Pietermaritzburg the appellant committed an act of sexual penetration with a 7 year old complainant (K), by inserting his genital organ into the genital organ of the complainant. In count 3 it is alleged that the appellant contravened s 5(1) of the Sexual Offences Act in that on an unknown date at Scottsville in Pietermaritzburg the appellant sexually violated the minor child complainant T, by fondling his private part under his underwear. In count 4 it is alleged that in 2016 at Scottsville in Pietermaritzburg the appellant sexually violated a 9 year old complainant (S), by touching his bum without his consent. At the hearing of the second bail application, it was stated that further four charges or allegations have been added to the case against the appellant, but there were no particulars furnished relating to those charges.

- [4] No oral evidence was lead during the first bail application. The appellant had elected to lead his evidence by means of an affidavit. The state opposed the bail application also by placing before the magistrate an affidavit deposed to by the investigating officer. The affidavit of the investigating officer in longhand and written in a somewhat cryptic a manner stated as follows:

'There is a pattern/modus and the evidence confirms consistent pattern. Evidence against accused is made of victims' statement. They all know accused/medical reports and psychologists report. Similar facts in all 3 cases disclosure made to different persons. Victims are unknown to each other and in different grades

There is another case Alexandra case 516/06/2016 victim 10 years. 1st appearance today,-Fear for safety of victims,-court has allowed 1 victim's name to be called out in court in presence of teachers who came to support accused on 1st appearance

Accused if released will interfere with witnesses and interrogation,-two further cases are opened Alexandra CS 517/E 518/06/2016 under investigation-pending disclosure ,counselling needed ,-three further enquiries to be registered-pending investigation.-serious allegations,-Public outrage, accused will flee if released ,-not arrested /at place of residence,-more victims are coming forward and some to be traced ,-Health profession council of SA-registration status suspended, He has been suspended ,-children on list given by the principal who the accused counselled

Facts of the case are as follows: Alleged that minor victims were sexually abused or raped by accused during counselling sessions at school,- Victim statement obtained from different individual -different officer + psychologists reports; -Investigation incomplete. Further 2 more dockets + 2 enquiries; For further investigation, crime scene + medical examination for accused, DNA clinical swabs to be taken

How accused is linked: -modus operandi, consistent pattern, -Victim + statements, psychologists' reports, medical examination, -All victim name accused'

In my view, it is unfortunate that the evidence by the state was presented in this manner and it was not clarified by oral evidence. Bail proceedings are a very important stage in the criminal proceedings. They cannot be approached in a lax manner.

- [5] The appellant, in his affidavit, stated that he was 32 years old. He was residing at a Farm Saxony where he was a tenant for the past twelve months. Prior to that he resided at other places in the area of Pietermaritzburg. He stated that his family resides at Cowies Hill, Pinetown. He was not married.

The appellant stated that he matriculated with six A's and he was a prefect. He is a qualified teacher, having graduated at the University of KwaZulu-Natal and he has a Master's Degree in Psychology. At the time of his arrest he was employed permanently at Scottsville Primary as a school counsellor. He was earning R22 000 per month. The appellant stated that he was a keen sportsman with provincial colours in athletics, cycling and dual Athlon. He provides coach in MTB, track racing and spinning. He is a keen photographer. He stated that since his arrest he has been dismissed from his employment.

- [6] The appellant stated that he denies all the charges against him. The children, he counselled, were referred to him by other professionals. He did not commit any unbecoming behaviour towards the children. The appellant alleges that the charges have been fabricated and that the children have been influenced. He stated that he had no previous convictions and he had no other cases pending against him. He was not a flight risk. He knew the complainants mentioned in the charges and he had no intention of interfering with them. The children are in the custody of their parents.
- [7] The learned magistrate refused the first bail application finding that since the arrest of the appellant more complainants have come forward which indicates that they may have been too scared. Further, he found, that the offences took place at school and that the appellant enjoys a lot of support from fellow teachers, therefore, it is most probable that he may influence or tamper with witnesses if he is released on bail. He concluded that the appellant was a flight risk as he had no fixed assets or permanent residence of his own.
- [8] The appeal court (Chili J) found that the learned magistrate had misdirected himself in numerous respects. The court held that, as a result, the appeal court was required to consider the matter afresh. It had to undertake its own analysis and come to a conclusion. Chili J concluded that the appellant had failed to discharge the onus on him. The court stated that the appellant was facing very serious charges of rape of young children whose ages ranged from 7 to 9 years; when the offences were committed the appellant had been

placed in *loco parentis*. The likely hood existed that in the event of a conviction, the appellant could in all probabilities be sentenced to a lengthy sentence of imprisonment. Offences of rape of children carry mandatory sentences of imprisonment for life. Chili J remarked that it is tempting to state that the reason the appellant chose not to testify was because he had something to hide. However, the appellant was in a better position to clarify this aspect. The learned judge stated that the prosecutor alleged, and this was not contested by the appellant, that the charges in both the rape and the sexual offence were supported by medical evidence. Further, the prosecutor alleged that the complainants were traumatised to the extent that they had to receive counselling. Chili J held that the court had to accept, in the light of the uncontested submissions by the public prosecutor at the bail hearing, that there was merit in the allegations that the complainants on counts 1 and 2 were raped.

[9] The appeal court, with respect to the learned judge, overlooked that the submissions by the public prosecutor were not supported by evidence; i.e. these allegations were not based on evidence adduced before the court, and hence they fall not to be taken into consideration. The appeal court dismissed the appeal against the refusal of the first bail application on the basis that the state had a strong case against the appellant based upon the submissions made by the public prosecutor, which submissions were, in my view, not based on any evidence. The appeal court, with respect to the learned judge, overlooked the fact that the appellant had not been furnished with the contents of the docket or any other documentary evidence. He did not know the contents of the statements of witnesses, the medical reports and/or the psychologists' reports.

[10] In the second bail application the appellant submitted an affidavit and also gave oral evidence. He repeated the averments in his earlier affidavit. He testified that the state's case against him was not strong. The Deputy Director of Public Prosecutions ('the DPP'), when the docket was submitted to him, had pointed out the shortcomings in the investigation, *inter alia*, statements of some complainants had not been obtained; there was no evidence of a

modus operandi, etc. The investigating officer testified that the other complainants, after having received counselling, have made disclosures and have come forward. There were now eight charges. Most of the deficiencies pointed out by the DPP have been attended to. He stated that he had obtained statements of witnesses in the remaining six of the eight matters. One deficiency raised by the DPP related to the complainants making their statements in a question and answer format. He stated that in the remaining two matters statements will be obtained if after counselling the disclosure are made. He stated that the medical evidence showed evidence of a blunt trauma.

- [11] In addition, the investigating officer stated that the appellant has interfered with the crime scene by instructing persons to remove and destroy exhibits. He communicated by means of a letter with a person who is now a complainant. The appellant in response stated that he asked that person to remove his stuff, which was not connected to the case, for safe keeping. He stated that that person has tried to blackmail him stating that he must commit suicide and if he is a coward, she will assist him, and that he must make her a sole beneficiary in his will. He stated that at that stage when he communicated with her, she was not a state witness or a complainant.
- [12] The public prosecutor in his address stated that the questions around the residence of the appellant have been cleared. The state was now accepting that the appellant was not a flight risk. Further, he stated that initially one of the grounds on which bail was opposed was that if released on bail the appellant's life will be in danger, but now the state was also abandoning that ground. He insisted that the communication by the appellant was an indication that, if released on bail, he will interfere with the outstanding investigation and with the witnesses. In my view, there was no evidence of an attempt to destroy evidence or to interfere with state witnesses produced. The allegations were not clarified and they were not supported by the evidence presented to establish interference. It was not explained why if it was known that there was such evidence, the evidence was not seized. There was no statement by any person showing the appellant had actually contacted them.

The fact that the complainants were children who are in the custody of their parents and the appellant had been dismissed from his employment with the school indicates the unlikely hood of any interference.

[13] The learned magistrate refused the second bail application on the same reasons that it was necessary that the appellant remain in custody so that more victims will be prepared to come forward and disclose. The reasons were found by the appeal court, and I agree with that finding, to constitute a misdirection. The appellant was arrested on 25 June 2016 and the first bail application was refused on 18 July 2016. On 30 November 2016 the second bail application was refused. The potential complainants, if any, had had more than six months to come forward whilst the appellant was in custody. Such a ground cannot, in my view, be relied upon to refuse bail to the appellant.

[14] The appeal court dismissed the appeal against refusal of bail on the ground that there was a strong case against the appellant which in view of the applicable sentence renders him a flight risk. I have indicated above that, in my view, there was no basis for such a conclusion. However, the crimes relating to the rape of minor children are very serious. They call for a proper and thorough investigation and a proper presentation of the case. In terms of s 65(4) of the CPA, this court can only interfere with the decision of the magistrate if it is satisfied that such decision was wrong. (see *S v De Abreu* 1980 (4) SA 94 (W); *Attorney -General of Zimbabwe v Phiri* 1988 (2) SA 696 (ZH) at 698C-D; *S v Mpfana* 1998 (1) SACR 40 (Tk) at 44b-c). The issue is whether it has been shown that there is a strong case against the appellant. It was initially four charges that were preferred against the appellant. By the time of the second bail application, there were a further six to eight incidents/allegations being investigated. The state, although not obliged to, did not produce any evidence in support of the charges. The investigating officer did not indicate existence of strong evidence against the appellant. The four initial charges, which is probably the case with all the charges, indicate the date, month and year of the commission of the crime as 'unknown'. The only evidence implicating the appellant appears to be an allegation against the appellant made by each child. There is no evidence of

the first report. The allegations brought against the appellant are made subsequent to counselling sessions. There is no DNA evidence. These allegations are based on the evidence of single child witnesses. It is required that such evidence, to found a conviction, must be approached with extreme caution.

[15] In *S v Acheson* 1991 (2) SA 805 (NM) at 821G-H, it was held that in hearing a renewed bail application, the court is entitled, indeed obliged, to have regard to all the circumstances which impact on the issue when the new application is heard, which includes prior evidence and information. The renewed application will only be properly judged with reference to the facts and circumstances which were placed before the court in the first instance (see also *S v Mpofana* 1998 (1) SACR 40 (TK) at 44g-j & at 45a-b). The learned magistrate was obliged to bear in mind the decision and the reasons given by the appeal court in the first bail appeal (Chili J). The judgement of the appeal court was required to be part of the information before the magistrate. There is no reference by the learned magistrate to the judgement of the appeal court. It constituted a misdirection not to take into consideration relevant information. The learned magistrate was obliged to consider the renewed bail application in the light of the evidence in the initial bail application, the first bail appeal judgement and in the light of the evidence adduced in the renewed bail application.

[16] Where an accused, as it is the case with the appellant, is charged with an offence referred to in schedule 6 of the CPA, he carries the burden of satisfying the court on a balance of probabilities that exceptional circumstances exist which, in the interest of justice, permit his release on bail (see s 60(11)(a) read with schedule 6 of the CPA). It has been held that the concept of exceptional circumstances is indefinable. Its proof appears formidable but promotes flexibility which is subject to judicial control on a case by case basis. Circumstances that may be regarded as ordinary in one case may be treated as exceptional in another. The section should not be interpreted to mean that the procedure is punitive in that an accused who has

demonstrated, with reference to usual circumstances governing bail applications, that he will stand trial and will not cause harm to the administration of justice or society, should nonetheless be detained.(see *S v Dlamini*; *S v Dladla and other*; *S v Joubert and S v Schietekat* 1999 (2) SACR 51 (CC) at 78e-g; *S v Mohammed* 1992 (2) SACR 507 (C) at 513 h-j & 514a-c).

[17] The guidelines provided by the legislature in s 60(4) to (8) of the CPA provide easy reference, should all, or a substantial number be present in favour of the accused, he may well be said to have discharged the onus of proving the existence of exceptional circumstances. But the provision should not be read as authorising random incarceration of persons who are suspected of having committed schedule 6 offences, who are presumed innocent until proven guilty in a court of law. The likelihood of acquittal weighs heavily towards discharging the onus (see *S v Jonas* 1998 (2) SACR 677 (SE) at 678g-i & at 679b-d). Looking at the evidence in its entirety, the appellant, in my view, established the existence of a substantial number of factors in the guidelines in favour of granting bail.

[18] Incarceration prior to a conviction with all its irreversible indignities and consequences may not be resorted to easily in a constitutional democracy with an enshrined Bill of Rights. It must be for a good reason. In particular, it must be to ensure the integrity of the administration of justice including effective prosecution of crime and punishment of offenders (see *S v C* 1998 (2) SACR 721 (C)). However, an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment (see *S v Acheson* supra 822A-B). I come to the conclusion that the appellant has shown that there are exceptional circumstances, in the interest of justice, that permit his release on bail.

[19] The following order is made:

1. The appeal is upheld
2. The decision of the magistrate to refuse release of the appellant on bail is set aside and replaced with the following:

'The accused is granted bail in the sum of R10 000-00 subject to the following conditions:

- (a) The accused attends the criminal proceedings on each and every occasion until finalised.
- (b) The accused does not; directly or indirectly; interfere with state witnesses and/or the investigation of the criminal proceedings against him.
- (c) The accused is prohibited from travelling to outside South Africa without the permission of the investigating officer and he is ordered to surrender his passport and/or travel documents to the investigating officer prior to his release on bail.
- (d) The accused does not stay away from his place of residence, the particulars thereof having been furnished to the investigating officer in writing, for more than three days in succession without the permission of the investigating officer.
- e) The accused does not coach, train, teach, and or counsel any person below the age of eighteen years and does not visit, enter or access facilities wherein persons below the age of eighteen years are coached, taught, trained and/or counselled.'



MNGADI

APPEARANCES

Case Number	:	A 6571/16
Appellant	:	Darren Marc Goddard
Represented by	:	Mr Osborn
Appellant's Attorneys	:	Siva Chetty and Company 033 342 9636
Respondent	:	The State
Represented by	:	Adv. Khathi
Respondent's Attorney	:	The Director of the Public Prosecution Pietermaritzburg
Date of Hearing	:	14 March 2017
Date of Judgment	:	27 March 2017