



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 66 / 2016**
Datum aangehoor/Date heard: **13 / 07 / 2016**
Datum gelever/Date delivered: **15 / 07 / 2016**

In the matter between:

THATO ASHLEY LENNON MOCUMI

Appellant

and

THE STATE

Respondent

Coram: Erasmus, AJ

JUDGMENT ON APPEAL : BAIL APPLICATION

ERASMUS, AJ

[1] The appellant lodged an appeal to this Court against the judgment and order of the Magistrate, Galeshewe, Mr. Blaauw, in which the application for the release of the appellant on bail was refused.

- [2] The appellant was arrested on 10 May 2016. The bail application commenced on 16 May 2016 and concluded on 24 May 2016 with the Magistrate refusing bail.
- [3] The appellant had legal representation throughout the bail proceedings.
- [4] In terms of the annexure to the charge sheet, it appears that the appellant faces a charge of contravening s 15 of Act 32 of 2009 (statutory rape). It was, however, common cause during the bail hearing that he faces a charge of contravening s 3 of Act 32 of 2009 (rape), allegedly committed in respect of a 13-year old girl and that this offence falls under Schedule 6 of the Criminal Procedure Act, 51 of 1977 ('the CPA'). From the record it also appears that the magistrate accepted this to be the correct position, explaining it as such to the appellant and adjudicating the bail application on that basis.
- [5] Bail proceedings in respect of offences listed in Schedule 6 are governed by the provisions of s 60(11)(a) of the CPA. In terms thereof *"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"*.

- [6] S 60(11)(a) sets out two requirements which an applicant has to establish on a balance of probabilities. The applicant must show the existence of exceptional circumstances and that such exceptional circumstances, in the interest of justice, permit his release on bail. The second enquiry only commences once the applicant has established the existence of exceptional circumstances.¹
- [7] It is now trite that an applicant in a bail application is given a 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. It is not possible to provide a list of possibilities which will constitute exceptional circumstances. The personal circumstances of the appellant, individually or cumulatively viewed, can constitute exceptional circumstances. It is also trite that an applicant in bail proceedings can advance a weak case against him in an effort to show exceptional circumstances.² In support of the appellant's bail application, an affidavit was read out and handed in as Exhibit 'A'. No oral evidence was adduced. The appellant's statement contained the following averments which are contended to be of relevance in the discharge of the onus:

¹ **S v Vanqa** 2000 (2) SASV 371 (Tk) at 376 j; See also **S v DB and Others** 2012(2) SACR 492 (GNO) from 495

² **S v Mathebula** 2010(1) SACR 55 (SCA) at para [12]

- 7.1 He is 33 years old and single;
- 7.2 He has 3 children, all residing with their respective mothers and he is responsible for the maintenance of these children;
- 7.3 He is gainfully employed and earns approximately R16 000 per month;
- 7.4 He has a fixed abode and maintains a close relationship with his family;
- 7.5 He has no previous convictions and there are no pending cases against him;
- 7.6 The appellant intends pleading not guilty. He alleged that the State did not have a strong case against him. This contention was based on the following:
 - 7.6.1 He alleged that he and the complainant established a romantic and sexual relationship, after having met her at a tap near their respective homes. The initial friendship was initiated by the complainant when she had invited him as a friend on Facebook.

7.6.2 On the day of the alleged rape, 8 May 2016, he and the complainant had an appointment that she would meet him at his shack at 20:00. She had sent messages stating that she would not be able to make it and later sent a message that her mother intends leaving the house. He sent a message at 21:10 inviting her to his place as her mother would not be at home. The complainant arrived at 23:00.³ They discussed several issues, amongst others her schooling and background.

7.6.3 The complainant informed him that she had failed grade 11 and that she would be turning 19 on 6 October 2016. During a discussion of their age gap, the complainant informed him that she was indeed older than 17 years and that she had had romantic and sexual relationships in the past.

7.6.4 During the night of 8 May 2016 the appellant and complainant engaged in consensual sexual activities.

³ In the record the time was transcribed as 03:00; Record: p 6 | 25

7.7 The appellant further dealt with the provisions of s 60(4)(a) to (e) of the CPA and denied the likelihood of any of the circumstances set out in the subsections occurring. He stated pertinently that he would not a) pose a danger to the public, b) evade his trial, c) interfere with witnesses or evidence, and d) that his release would not jeopardise the functioning of the criminal justice or bail system or disturb public peace or order.

7.8 In respect of s 60(9) of the CPA the appellant submitted that the interests of justice do not require his incarceration for purposes of his trial.

7.9 In respect of s 60(11)(a) of the CPA he submitted that the interests of justice would be served by him being released on bail and that the cumulative effect of these circumstances rendered them 'exceptional' for the purpose of justifying his release on bail. These special circumstances alleged to exist are the following:

7.9.1 The State does not have a case against him as he does not believe that he had committed a schedule 6 offence; and

7.9.2 He stands to be severely prejudiced by his incarceration, particularly when having regard to the long delay prior to the matter going to trial as well as the long delay in receiving the results of the forensic analyses.

[8] The respondent adduced the oral evidence of both the investigating officer and the mother of the complainant. From the evidence it appears to be common cause that the complainant was indeed 13 years old at the time of the commission of the offence. It is further common cause that the appellant had had sexual intercourse with the complainant.

[9] The investigating officer testified from the contents of the police docket and contended that the version of the complainant appears to substantiate a charge of rape. I shall deal more fully with the version of the complainant later. The complainant was examined by a medical practitioner. From the form J88, as read out by the investigating officer, it appeared that the doctor had noted swelling of the genitals and signs of labial and hymenal penetration. It is further common cause that the shack of the appellant is in close proximity to that of the mother of the complainant. The community in that area has expressed their revolt at what had happened and there have been threats made to kill the accused and to burn his shack.

- [10] During cross-examination the investigating officer conceded that there was no risk that the appellant would evade his trial and furthermore that there was no evidence of any likelihood that he would commit a Schedule 1 offence if released on bail. She requested that, should the Court release the appellant on bail, conditions be imposed that he report to the investigating officer on a daily basis and further, that the appellant and his family be ordered not to interact with the complainant and/or her family.
- [11] The version of the appellant was put to the investigating officer and she was specifically asked to estimate the complainant's age, she refused to speculate and had made no comment on the physical appearance of the complainant. Neither the contents of the J88 pertaining to the doctor's observations with regard to the complainant's physical development, height and/or mass nor any other evidence in this regard was presented to court to counter the appellant's version that he had truly believed the complainant to be older than 17 years. She also refused to comment on the merits of the case against the appellant.
- [12] The mother of the victim testified about the events of the night of 8/9 May 2016 and certain events after the arrest of the appellant.

- 12.1 She stated that the complainant did not have a cell phone but had made use of hers. She had been under the impression that the complainant had been outside to relieve herself, but confirmed that upon the complainant's entering of the house, she had demanded to know where she had been and had threatened to have 'wineja tsotsi', which appears to be some vigilante crime prevention group, called. The complainant had then asked for forgiveness and the mother wanted to know what for.
- 12.2 The complainant's mother denied the appellant's version of the events of the night of 8 May 2016. She also testified that she had met with the appellant on three occasions while she was searching for the complainant during the night of 8 and 9 May 2016 and that he, at some stage, had wanted to know what she intended doing once she had found her child.
- 12.3 The mother also testified that she had been approached by persons purporting to be relatives of the appellant on several occasions. On one of these occasions they wanted the two families to discuss the issue. On another occasion the family apologised to the mother of the complainant and then wanted to know which school the complainant was attending. They also requested her to hand the complainant over

to them as they did not trust the report compiled at the Kimberley Hospital and therefore wanted the child to be 'checked' at the Gariep Hospital. On another occasion she was approached by two males who had offered, through other ladies present at the mother's house, to pay an amount of R10,000.00 if the case was to be withdrawn.

[13] It appears that the learned magistrate had found that, although the personal circumstances of an applicant cumulatively considered, might be regarded as exceptional circumstances, the circumstances of this appellant cannot be considered to be exceptional. He further found that the release of the appellant would not be in the interest of justice. He based this on the provisions of s 60(4)(c) and 60(4)(e), read with s 60(7) and 60(8A) of the CPA and his reasons appear to be the following:

13.1 The complainant lives in close proximity to the appellant and there is evidence to suggest that there has already been intimidation and/or attempts to influence the mother of the complainant.

13.2 The appellant is 33 years of age and the complainant a mere 13 years and can thus be easily influenced.

13.3 The release of the appellant will disturb the public order or undermine the public order and/or undermine the public peace or security in light of the evidence which had been led of threats having been made to the appellant and his property.

[14] In his Heads of Argument, Adv. Nel, on behalf of the appellant, submitted that the learned magistrate misdirected himself by adjudicating the bail application on the basis that a Schedule 6 offence had been committed, whilst the annexure to the charge sheet pertained to a Schedule 1 offence in terms of which there would then have been no onus on the appellant. Given the fact that it was common cause between the State and defence that the charge was rape, he abandoned this point, save in as far as he argued that the annexure to the charge sheet, as was completed by the prosecutor before the bail proceedings commenced, must be considered relevant when the strength of the respondent's case is considered. Ms. Ilanga submitted that the framing of the charge sheet was a *bona fide* error by the prosecutor. I do not agree. The charge sheet, one must assume, was properly completed and annexed based on evidence contained in the case docket. I agree with Mr. Nel that it is a relevant factor when considering the relative strength of the case against the appellant.

- [15] I am satisfied that for purposes of this appeal the matter should be approached in terms of s 60(11)(a) of the CPA, as was done before the court *a quo*. The issue of the charge against the appellant not falling within schedule 6 was never raised before the court *a quo*.
- [16] Mr. Nel then proceeded to argue that the learned magistrate was wrong in finding that the appellant had not established exceptional circumstances, given the favourable personal circumstances of the appellant and the fact that the State does not have a strong case against the appellant, especially so in respect of a charge of rape.
- [17] In respect of the learned magistrate's finding based on s 60(4)(c) of the CPA, Mr. Nel also submitted that the magistrate had misdirected himself in finding that there were attempts at intimidating and/or influencing the mother of the complainant and attributing those to the appellant, as the appellant had no knowledge thereof. In respect of the finding based on s 60(4)(e) of the CPA, Mr. Nel submitted that threats by vigilante groups could not and should not be allowed to influence a court when considering bail. S 60(4) requires exceptional circumstances to be present and if so found to exist, must be weighed against the provisions of s 60(9). The fears of the investigating officer were merely based on possibilities and that those can be addressed by

setting proper bail conditions. He referred to *S v Swanepoel*⁴ where Hatting J stated that the possibility or suspicion of such events occurring is not enough, and that it has to be found probable that such events will occur.

[18] Mr. Nel further submitted that the magistrate did not, after making the findings in respect of s 60(4)(c) and(e), apply the provisions of s 60(9) of the CPA, as he had not weighed the interest of justice against the right of the appellant to his personal freedom and the prejudice he was likely to suffer if he was to be detained.

[19] Adv. Ilanga, on behalf of the respondent, submitted that the learned Magistrate was correct in finding that the appellant had not established exceptional circumstances and submitted that the State indeed has a strong case against the appellant. It was for the appellant to prove, on a balance of probabilities, that there will be an acquittal.

[20] Ms. Ilanga further submitted that the magistrate did not misdirect himself in the application of the provisions of s 60(4) and was correct in refusing bail. In respect of ss (4)(c), read with s 60(7), it has been established that the appellant is familiar with the identity of the witnesses and with him living in close proximity to the complainant,

⁴ 1999(1)SACR 311 (O); See also *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999(2) SACR 51 (CC) at para [53] and [57]; *S v Diale and Another* 2013(2) SACR 85 (GNP) at para [14]

increases the likelihood of interference and intimidation by the appellant's family. In respect of ss (4)(e), read with s 60(8A), she submitted that the crime induced a sense of shock in the community and that it has been shown that there are threats of violence against the appellant and his property.

[21] In terms of s 65(4) of the CPA the court of 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 such event the court or judge shall give the decision which in its or his opinion the lower court should have given. With reference to s 39(2) of the Constitution of the Republic of South Africa, 108 of 1996 ('the Constitution'), this section must be construed in a manner which does not unduly restrict the ambit of an Appeal Court's competence to decide whether the lower court's decision to refuse bail was 'wrong'.⁵

[22] An applicant in bail proceedings is burdened with the onus to adduce evidence showing something substantially out of the ordinary to be established before bail will be granted.⁶ Although an applicant can adduce evidence by means of an affidavit, such evidence might prove difficult to

⁵ *Section 65(4) of Act 51 of 1977; S v Porthen* 2004(2) SACR 242 (C) at para [17]

⁶ *S v H* 1999(1) SACR 72 (W) at 77 e-f; *S v Botha* 2002(1) SACR 222 (SCA) at para [16] –[21]; *S v Viljoen* 2002(2) SACR 550 (SCA) at para [13] – [15]

satisfy/convince a court that *exceptional circumstances* do exist.

[23] In this instance the appellant attempted to discharge his onus and refute the State's case based upon an affidavit which was not open to be tested under cross-examination.⁷ The contents of the affidavit contained details pertaining to the defence of the appellant and required the respondent to counter the allegations by presenting evidence. It is important in this instance whether the appellant had successfully challenged the merits of the case against him.

[24] It is common cause that the appellant, a 33 year old man, had intercourse with the complainant who is only 13 years old. It appears that there was swelling to the genitals of the complainant when she was examined approximately 12 hours after the incident. When evaluating the facts in a bail application, it should be borne in mind that there is a fundamental difference between the objective of bail proceedings and that of the trial. There are certain factors that do tend to tilt the probabilities in favour of the appellant's version, casting some doubt on the State's case.

24.1 The appellant has shown, on a balance of probabilities that the complainant had invited him on Facebook and

⁷ *S v Pienaar* 1992 (1) SACR 178 (W) at 180h

that they had become friends. According to him this friendship developed into a relationship and eventually resulted in consensual sexual intercourse.

24.2 There are aspects of the complainant's version, as placed on record by the investigating officer, which favour the appellant's version and might cast some doubt on the charge of rape if presented during the trial.

24.2.1 During the night in question the complainant had left their shack to defecate and she saw the appellant at the communal tap. He called out to her and she approached him. After a while she went back to the shack where she and her mother stayed. Her mother wanted to know where she had been as she had been looking for her. The complainant did not respond and her mother threatened that she would call one "tsotsi". She ran out of the shack, fleeing, because she feared that her mother would call "tsotsi". She ran up the road and stopped. While standing there, the appellant came to her and requested her to accompany him to his shack until her mother had calmed down. She complied.

24.2.2 At the shack of the appellant, the complainant went to sit on the appellant's bed. He was busy doing laundry. The complainant fell asleep and awoke when she felt her panty and pants being pulled down by the appellant. She tried to stop him and told him that her mother wanted her to continue with her schooling and to only indulge in sexual activities after completing matric. The appellant informed her that he was not going to hurt her and proceeded to have intercourse with her. She shouted but nobody could hear her. After the rape the appellant went outside to smoke and she got dressed. Before she fell asleep again, the appellant had locked the door of the shack as well as the burglar door and had left. He only returned after the sun had risen. He told her to go back to her shack as there were police vehicles in the vicinity of the complainant's house. She returned to their shack and informed her mother, who by then was trying "to trace her up" to find out what had happened to her.

24.2.3 There is no objective evidence to show that the complainant had tried to call for help or attempted to attract attention. Her mother,

who had spent the night looking for her and knocking on doors of shacks in the vicinity, could not find her nor could she hear her.

[25] In the light of the version of the appellant, read with the version of the complainant and her mother, the absence of any averments or evidence pertaining to the physical appearance of the complainant on behalf of the State in the face of the specific defence raised by the appellant and the investigating officer's reluctance to express an opinion on the strength of the case, I am of the view that the appellant has succeeded in casting doubt on the State's case. This factor, together with the favourable personal circumstances of the appellant, constitutes exceptional circumstances. The issue that remains to be answered is whether such circumstances, in the interests of justice, permit the appellant's release on bail.

[26] In a bail application the inquiry is not really concerned with the question of guilt and is only relevant to the extent to which it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial. This entails mainly protecting the investigation and prosecution of the case against hindrance.

[27] The primary purpose of arrest and detention is to ensure that a person who allegedly committed a crime, will appear in court at his or her trial. The purpose of bail on the other hand is the security offered in return for release from detention, subject to the accused's appearance at his or her trial. Release on bail is a means of giving effect to the presumption of innocence contained in s 35(3)(h) of the Constitution and ensuring that a person accused of having committed a crime, stands trial. Mahomed AJ (as he then was) stated the following in **Acheson**⁸

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

[28] In deciding whether the interests of justice permit the release on bail the court must consider the considerations mentioned in s 60(4)(a)-(e) of the CPA. A court hearing a bail application has to bring a reasoned and balanced judgment to bear in an evaluation in which the liberty interests, namely the personal freedom of and possible prejudice to the arrested person, are given the full value afforded by the Constitution.⁹

⁸ 1991(2) SA 805 (Nm) at 822A

⁹ **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat** *supra* at paragraph [11] at 641F-H and paragraphs [47] - [50] and [101] at 656H-657B/C, 657E/F-658A and 680H-J and Section 60(9) of Act 51 of 1977; See also **S v DB and Others** 2012(2) SACR 492 (GNO) from 495

- [29] Ordinarily the State will be required to show the probability of the events envisaged in s 60(4)(a)–(e) of the CPA occurring and there is a burden on the prosecution to adduce evidence or furnish information to show the likelihood that circumstances, as envisaged in s 60(4), exists. The situation is different where s 60(11)(a) is applicable.¹⁰
- [30] In my view the appellant has set out in his affidavit that the events envisaged in s 60(4)(c) and (e) will not occur. The evidence presented on behalf of the respondent, point to a possibility that witnesses might be influenced or intimidated and/or further that his release will disturb the public order or undermine the public peace or security.
- [31] S 60(4)(c) must be read in conjunction with s 60(7). Although the appellant and complainant know one another, both the complainant and her mother have already given statements to the police and the investigation has been completed (save for the outstanding forensic report). The appellant does not have access to any evidentiary material that could be concealed or destroyed. The mother had resisted all attempts of the appellant's family at influencing her. Furthermore, there was no evidence that the appellant was even aware that his family had embarked on the steps

¹⁰ *S v Tshabalala* 1998 (2) SACR 259 (C) at 269e–f; *S v Vanqa* *supra* at 376b - d

referred to by the mother of the complainant. Even if there was a likelihood of such events occurring, these concerns of the State can be addressed by setting enforceable bail conditions.¹¹

[32] S 60(4)(e) provides that the interests of justice do not permit the release from detention where, in exceptional circumstances, there is the likelihood that the release on bail will disturb the public order or undermine the public peace or security. It must be read in conjunction with s 60(8A). Although there is evidence that there had been threats by the community against the appellant that might jeopardize his safety, I do not deem these exceptional. Even if I accept that there is evidence in respect of the factors set out in ss (8A)(a) – (e), refusal of bail on these grounds should be approached with caution¹² and must still be weighed against the consideration enumerated in s 60(9).¹³ There is no indication in the judgment of the court *a quo* that due consideration had been given to ss (9).

[33] S 60(9) reads as follows:

“In considering the question in subsection (4), the court shall decide the matter weighing the interests of justice against the right of the accused to his or her freedom and in particular, the prejudice he or

¹¹ *S v DB and others* *supra* at para [54] and [55]

¹² *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* *supra* at 104 h-j, para [57]

¹³ *Prokureur-generaal, Vrystaat v Ramokhosi* 1997(1) SACR 127 (O) at 155d-h; *S v Yanta* 2000(1) SACR 237 (Tk) at 243i

she is likely to suffer if he or she were to be detained in custody taking into account where applicable the following factors, namely —

- (a) the period for which the accused has already been in custody since his or her arrest;*
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;*
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;*
- (d) any financial loss which the accused may suffer owing to his or her detention; ...”*

[34] As stated by Legodi J in *S v DV*¹⁴, these factors have to be taken into account in a bail application where s 60(11)(a) applies. The learned magistrate had erred in not considering these factors.

[35] In my view he also erred, as correctly argued by Mr. Nel, in finding that the appellant failed to discharge the onus placed upon him by the provisions of s 60(11)(a) of the CPA and had erred in finding the detention of the appellant to be in the interest of justice.

[36] It is not the intention of the legislature in enacting s 60(11)(a) to legitimize the random incarceration of persons who are suspected of having committed Schedule 6 offences. Courts should lean in favour of the liberty of an

¹⁴ *Supra* at para [51]

accused provided that it is clear that the interest of justice will not be prejudiced thereby.¹⁵

[37] Bail conditions do and have always served to address whatever fears the State might have if an accused is to be released and must be considered during the bail application. The imposition of bail conditions to secure the interests of the State appears not to have been considered.

[38] Conditions pertaining to communication between the appellant and state witnesses can be enforced. Certain forms of communication can be prohibited.¹⁶ Mr. Nel indicated that the appellant can reside with his mother, approximately 10 to 12 km away from the shack where the complainant resides. Although the appellant is not considered to be a flight risk, the investigating officer had requested during her evidence that a condition pertaining to him reporting to her at her offices be imposed. It was not argued that the appellant could not afford to pay a substantial amount in bail.

[39] When weighing the interests of justice against the right of the appellant to his freedom and the prejudice he is likely to suffer if he is to be detained in custody, I find that the

¹⁵ **S v Siwela** 1999(2) SACR 685 (W);

¹⁶ **S v Mathonsi** 2016 (1) SACR 417 (GP)

interests of justice permit the release of the appellant on bail. The appeal therefore stands to succeed.

WHEREFORE I MAKE THE FOLLOWING ORDER:

1. The appeal is upheld;
2. The refusal of bail is set aside;
3. Bail is granted in the amount of R10,000.00 on the following conditions:
 - 3.1 The appellant must attend court at all times up and until the finalisation of the trial.
 - 3.2 The appellant must report daily between the hours of 07h00 and 08h00 at the office of the investigating officer, HARRIET PETRO MCKENZIE, FSC Unit Galeshewe Police Station.
 - 3.3 The appellant shall reside with his mother at her residence situated at 104 Sesing Ext up until finalisation of the trial and must furnish the said investigating officer with the full residential address of his mother;
 - 3.4 The appellant shall not contact, communicate and/or interfere with and/or intimidate any of the state witnesses, including the complainant and her mother Makojana Ivodia Mosoleng, directly or indirectly and/or by means of any cellphone or landline telephone, e-mail, Whatsapp, SMS, Twitter, Facebook or any form of electronic communication and/or through his friends, relatives or agents.

- 3.5 The appellant shall not visit or be present at or near the area known as Madiba Square, Kimberley and/or any other residential area where the complainant and/or her mother may reside during the duration of the trial against the appellant.
- 3.6 The appellant shall not leave the jurisdiction of the Magistrate's Court of the district of Kimberley without the prior permission of the Investigating Officer of the case and, in her absence, the head of the relevant section and/or unit.
- 3.7 The appellant shall hand over all passports and/or travel documents that allow him to travel outside South Africa to the said investigating officer.

SL ERASMUS
ACTING JUDGE

For the Applicants: Adv. I.J. Nel (oio Towell & Groenewald Attorneys)

For the Respondent: Adv. Ilanga (oio NDPP)