

**IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG**

Case No 1957/2012

In the matter of

MBONGISENI MAXWELL KHUMALO

Appellant

VERSUS

THE STATE

Respondent

J U D G M E N T

Delivered 4 MAY 2012

MURUGASEN,J:

This is an appeal consequent upon the refusal of bail to the appellant, Mbongiseni Maxwell Khumalo, in the Utrecht Magistrate's Court. The Appellant faces one count of rape of a 13 year old female child, (the State alleging that he has contravened the provisions of S 3 read with S 1, 56(1) 57 58 59 60 & 61 of the Criminal Law (Sexual Offences & Related Matters) Amendment Act 32 of 2007 and read with Section 51 and Schedule (2) of the Criminal Law Amendment Act 105 of 1997) and one count of Kidnapping.

This appeal is brought in terms of Section 65 of the Criminal Procedure Act 51 of 1977 ('the Act'), and the Appeal Court must therefore consider the appeal in accordance with the provisions of Section 65 (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.”

In dealing with the provisions of Section 65 (4), **Stegmann J in S v Mbele and Another 1996 (1) SACR 212(W)** held that the Court hearing the appeal is required to approach the appeal on the basis of the assumption that the decision of the court below was correct, and not to interfere with the decision unless 'satisfied' that it was wrong :

“the idea that must be grasped is that the Court of appeal is required to uphold the order made by the court below until enough has been done to persuade and satisfy the Court of appeal that the order was wrong, and, in the ordinary course, it is for the appellant to do whatever has to be done in that regard “ (page 221)

and further at 222 *a-b*:

'.....an appeal relating to the grant or refusal of bail is of a somewhat special nature. This is because the court of first instance is called upon to exercise a discretion and not to reach a conclusion of law based upon findings of fact.”

The charge of Rape in respect of which the Appellant has been detained is a Schedule 6 offence under the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997. Thus the application for bail falls within the ambit of Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977 (“The Act”) in

terms of which :

“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 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.”

The appellate authority in respect of Schedule 6 offences was set out with clarity in **In S v Porthen 2004 (2) SACR 242 (C)** by the Binns – Ward AJ, who held :

[17] Without in any way detracting from the courts' duty to respect and give effect to the clear legislative policy inherent in the provisions of section 60(11)(a) of the CPA (*viz.* that save in exceptional circumstances it is in the public interest that persons charged with the class of particularly serious offences listed in Schedule 6 to the CPA should forfeit their personal freedom pending the determination of their guilt or innocence: see *S v Dlamini, supra*, at paragraphs [15] and [66]–[68]), it is still necessary to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong" (see section 39(2) of the Constitution Act No. 108 of 1996.)

This court will exercise its appellate authority in terms of section 65 of the CPA, in accordance with the foregoing precept.

It has been contended by Mr Ntila obo the Appellant that the court a quo erred in refusing bail:

- 1 As the interests of justice favour the release of the appellant on bail.
- 2 In finding that exceptional circumstances did not exist despite the magistrate's concession that exceptional circumstances are not clearly defined and another court would have interpreted exceptional circumstances differently;
- 3 the appellant was not a flight risk; he is permanently employed, supports his family and has a fixed residence in his parental home.

In amplification of the foregoing Mr Ntila has submitted that:

On behalf of the State Mr Truter has submitted that the strength of the State case remained unchallenged by the appellant's version and failure to controvert the evidence that the complainant was rescued by the police. He concedes that the appellant is permanently employed and has traceable addresses. But the appellant remains a flight risk. This submission had to be considered in accordance with the factors set out in S 60 (6) of the CPA 51 of 1977 and the following relevant facts:

- 1 the appellant had no fixed assets or family and emotional ties in the area he is to be tried.
- 2 The onus is on the appellant to refute the allegation that he is a flight

risk

but he failed to address this aspect in that there was no evidence as to whether or not he is in possession of valid travel documentation.

3 The offences with which the appellant has been charged are serious and
the public must be protected against those who commit such offences.

4 He faces a sentence of life imprisonment.

5 The state case against the appellant is strong.

6 The appellant is dishonest and attempted to mislead the court by failing
to disclose his previous convictions. This is an indication that he may then not stand trial.

7 There is a risk that the administration of justice will be compromised as
there is evidence that there is undue pressure on the complainant to withdraw the charges.

Mr Truter submits further that the magistrate did not misdirect himself on the facts or the law and correctly denied the appellant bail in the absence of exceptional circumstances.

It is not in dispute that when an accused is indicted on a Schedule 6 offence, a court has the authority to grant bail only when the accused has discharged the onus on him to prove, on a balance of probabilities, that exceptional circumstances exist which permit his release on bail, and that the interests of justice will not be prejudiced inter alia that it is likely that he will stand trial, not tamper with witnesses or otherwise interfere with the investigation of the case

against them or endanger the public. Exceptional circumstances are not defined but depend on the facts and circumstances in each case.

It is evident in the ruling of the court a quo at the bail application on 27 October 2011, that the magistrate was cogniscent of the aforesaid circumscription of his authority and the relevant criteria to be used in the exercise of his discretion. At the commencement of his judgement he referred to the onus on the appellant and that the evidence he adduced had to satisfy that onus. He was also cogniscent that in a bail application the court had to distinguish between the merits of the matter and what constitutes exceptional circumstances, and that exceptional circumstances had to be determined according to the facts of each case. The appellant as correctly held by the learned magistrate advanced in support of his application only that he was in his permanent employment in the Newcastle area and would lose his job and be unable to support his family if he was held in custody. The appellant was however renting a room in the area, although he alleged that he was able to furnish a permanent residential address. He alleged that he had a 'one day relationship with the complainant; but he did not know where she lived. He undertook to abide by any bail conditions and to continue to reside at the rented room at Waterval prison. The court did not draw any adverse inferences from the failure of the appellant to answer certain questions put in crossexamination.

The magistrate then considered the evidence presented by the State: the testimony of the investigating officer and the reasons he furnished for opposing bail, inter alia the seriousness of the offence, the age of the complainant and her trauma, the coaccused not yet apprehended, and the reasons why he

considered the appellant a flight risk, and the injuries suffered by the complainant as recorded on the medico-legal report. The court also was alive to the fact that the IO was not present at the arrest and his evidence was hearsay, but such evidence was not inadmissible in a bail application. He also considered that the evidence of the IO was supported by the undisputed evidence that the removal of the complainant from the area in which her home was situated to Waterval where the appellant lived was not by agreement or with her consent, that the complainant herself called the police and she was found locked in a garage, and inferred therefrom that the complainant would be traumatised by her experience and be insecure if the appellant were to be released from custody.

The magistrate however found that the submissions by the IO on its own did not support his contention that the appellant was a flight risk. But from a consideration of some of the pertinent factors, as set out by Mr Truter in his argument before this court, the magistrate found that there was nothing to keep the appellant within the jurisdiction of the court in which he was charged and that he had no fixed assets. He concluded by stating that the legislature had prescribed the detention of offenders who committed crimes that fell within the ambit of Schedule 6 unless exceptional circumstances had been proved and that as the appellant had failed to discharge the onus on him in this respect, his application to be admitted to bail was refused.

On 7 November 2011, the appellant launched a further bail application on new facts which were :

- 1 the appellant had not disclosed his previous convictions

- 2 the police acted on their own in charging the appellant with rape
as the complainant did not state that she was raped when she
‘opened the case’
- 3 there were attempts on the part of the complainant to withdraw
the charges.
- 4 on 11 October 2011 the docket went ‘missing’ but it was in the
hands of a police officer who unsuccessfully attempted to
negotiate the withdrawal of the charges at a fee of R8000.
- 5 on 20 October 2011 a further charge of kidnapping was added

The appellant and his girlfriend Makhubu testified in support of this application. In his judgement on this further application, the learned magistrate held that the objective of Makubu’s evidence was to weaken the strength of the state case by undermining the credibility of the complainant. He held further that while her evidence might have been appropriate at the trial stage, it did not assist the appellant to discharge his onus to prove exceptional circumstances. He also concluded that the appellant’s failure to disclose his previous conviction despite being legally represented was a failure to be honest with the court; further the investigating officer had also approached the appellant’s attorney about his previous conviction. The failure to disclose his previous convictions was however not a new fact and was detrimental to the appellant’s application. The remaining grounds had also been in issue during the first bail application. The court held that there were no new facts presented to it during this application which proved exceptional circumstances existed which permitted his release on bail and dismissed the application.

It lies now for this court to consider whether in making the aforesaid enquiries and findings in respect of the facts of this particular matter and the evidence before him, the magistrate misdirected himself or erred when he found that the appellant had failed to discharge onus to satisfy the court on a balance of probabilities that there were exceptional circumstances which in the interests of justice did not require the detention of the Appellant but favoured the granting of bail to him.

In Porthen referred to earlier herein the court held :

[12] In determining whether or not a bail applicant has established the existence of "extraordinary circumstances" within the meaning of section 60(11) (a) of the CPA, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case, might not be enough to warrant the grant of the bail application in the peculiar context of another matter. In *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) at paragraph [19], page 230, Vivier ADCJ described the exercise required of the court as entailing the making of a "value judgment" as to whether the proven circumstances are of such a nature as to be "exceptional".

During the bail application Sgt Quinton Williams of the Special Crimes against Family and Children and Sex offenders Unit who was involved in the investigation of the offence but not in the arrest of the appellant, testified at the hearing in the court a quo on 27 October 2011 that in opposing bail the State relied on the following allegations:

- 1 At approximately 19h30 on 2 October 2011, the complainant who was 13 years old was sent by her mother to give some money to a friend
- 2 2 males pulled her into the car in which they had followed her. They covered her eyes but she managed to see that she was taken to a house at the Waterval Prison.
- 3 The appellant took her into the house tried to remove her clothes but failed because she resisted; he called his friend who helped remove her clothes although she continued to fight them.
- 4 The other male left and the appellant raped the complainant.
- 5 He then locked her in the garage while he slept in his bedroom.
- 6 The complainant called her family and then the police on the

cellphone she had with her; and the police located the garage in which she had been locked.

7 On her release she reported to the police what had happened and identified the appellant as the person who had kidnapped and raped her. He was then arrested. The second male has not yet been arrested.

8 The complainant was taken to the hospital the next day. The J88 medico legal report recorded redness and bruises in the vaginal area and fresh tears.

Williams also opposed bail on the grounds that the offence was very serious, the complainant was 13 years old, there was a strong case against the appellant and the other male was still at large. He did not know if the appellant was employed, he had no fixed property and Williams considered him a flight risk. The complainant was very traumatised and her family were very upset and they would be vulnerable if the appellant were released on bail. Williams on the basis of the information at his disposal as the investigating officer also disputed the appellant's version that he had met the complainant earlier and proposed love to her, to which she was receptive, that the appellant was alone in the evening, not in the company of another male.

The appellant

As the function of the court in a bail application is to prima facie determine the relative strength of the States's case (**S v Van Wyk 2005 (1) SACR 41 SCA**). the magistrate has relied on the testimony of Williams as the investigating

officer and the medicolegal report produced by the State to evaluate the strength of the state's case. But he also properly considered the evidence of the appellant and his witness to decide whether that the appellant had discharged his onus to provide exceptional circumstances in order to admit him to bail

In *S v Schietekat* [1998 \(2\) SACR 707 \(C\)](#) at 713 h- 714 a Slomowitz AJ stated:

‘Bail proceedings are *sui generis*.The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take into account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the *onus*.....’

The aforesaid guidelines lend cogency to the nature of the information that is in the possession of the State in respect of the commission of the offences, in particular the undisputed evidence of the manner in which the complainant was taken to the appellant's home and her rescue by the police after she contacted her family and the police from a garage in which she was locked, and the medico-legal report which recorded evidence of recent and violent or forcible sexual penetration.

As against the strong *prima facie* State case against the Appellant, the Appellant has adduced little persuasive evidence that he will stand trial. Although he is permanently employed in Newcastle, his lack of substantial assets and family ties in the area in which he will be tried, militate against

acceptance of his submission that he will not abscond, and is not a flight risk. As correctly pointed out by Mr Truter the appellant has failed to address this issue and merely relied on his employment in the area, his support of his dependants and his undertaking that he will remain at his rented room in Waterval.

On the other hand the considerations of the seriousness of the crime, and the manner in which the complainant was abducted and the deprivation of her liberty and the sexual assault that was perpetrated on her are not only relevant but will constitute aggravating factors in the consideration of whether the prescribed minimum sentence of life imprisonment is appropriate, and are therefore relevant in an assessment of whether the Appellant will attempt to evade trial.

Mr Ntila has submitted that it is in the interests of justice that the appellant be granted bail. However there has been no address in this respect which is also fatal to the application and appeal.

In exercising its judicial discretion, a court must consider the totality of the circumstances. **S v STANFIELD** [\(1\) SACR 221 \(C\)](#) at 226 c – d

I cannot therefore fault the magistrate's reliance on and the weight lent to the evidence presented by the State as opposed to the evidence furnished by the Appellant after a consideration of all the relevant evidence and his assessment that the factors advanced in support of the applications for bail did not constitute exceptional circumstances.

This court of appeal, like the magistrate, is fully cogniscent that the Constitution of South Africa provides that no person ought to be deprived of his freedom arbitrarily and that if it in the interests of justice, an arrested person is entitled to release from detention on bail.

Nevertheless, as duly considered by the court a quo, the provisions of Section 60 of the Act have been promulgated to regulate the granting of release from detention in respect of serious crimes and must accordingly be implemented with due regard to the guidelines provided by the act itself and decided cases.

Having considered the all the information placed before the court a quo I remain unpersuaded on the merits of this appeal. I am also unable to find that the magistrate has erred in his exercise of judicial discretion in finding that the Appellant has failed to discharge the onus on him to prove on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit the granting of bail to the Appellant.

In the premises the Appeal is dismissed.

THE HON MADAM JUSTICE MURUGASEN

No heads of argument

Record incomplete