

Reportable: Yes / No
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IN THE HIGH COURT OF SOUTH AFRICA

[Northern Cape High Court, Kimberley]

Case no: CA&R 32/09
Date heard: 2009-06-05
Date delivered: 2009-06-10

In the bail appeal of:

JOHANNES COENRAAD WESSELS

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J

REASONS FOR ORDER

MAJIEDT J:

1. The Appellant appealed against the refusal of bail by the Magistrate of Kathu. On 5 June 2009 I had issued an order granting bail in the amount of R5000.00 to the Appellant, subject to certain conditions. These are the reasons for that order.
2. The Appellant is to face a charge of rape, it being alleged that he had engaged in unlawful sexual intercourse without the consent of the complainant, a young woman. Bail was refused by the

presiding magistrate primarily on the basis that there was a likelihood that the Appellant would interfere, either directly or indirectly, with the State witnesses and the complainant should he be released on bail.

3. On behalf of the State, the investigating officer, inspector Mogosi testified, while the Appellant's attorney handed in an affidavit as his testimony. The magistrate in addition called a further witness, the head of the detective unit at Kathu SAPS, captain Smith. The facts which were germane to the bail application and to this appeal can be succinctly stated as follows:

- 3.1 The complainant was allegedly raped by the Appellant after the latter had given her a lift to her house. He took a detour with her and allegedly raped her in the veld. Subsequently, while the complainant was seeking assistance, she was raped again by two other men. Thereafter she was taken to the hospital and medically examined.

- 3.2 Inspector Mogosi testified about certain attempts by one Becay to influence the complainant to withdraw the rape charge against the Appellant. Inspector Mogosi alleged on a hearsay basis that Becay was employed at a tavern belonging to the Appellant, who is a businessman at Kathu. It was alleged that Becay had in fact accompanied the complainant to the police station in order for the latter to make a withdrawal statement, i.e. so as to have the rape charge withdrawn against the Appellant. It was also alleged that the complainant was offered R40 000,00 in cash if she

would acquiesce to a withdrawal of the charge.

3.3 The Appellant denied any attempts to influence the complainant or any other witnesses and undertook to stand his trial should he be released on bail.

3.4 Captain Smith testified about perceived interference in the case by the members of the detective unit in Kathu, which had resulted in the case being transferred to the Mothibistad SAPS detective unit where inspector Mogosi was stationed.

4. It was common cause at the bail hearing and also at the appeal before me that the only issue with regard to the bail application was the question whether the Appellant would interfere with the state witnesses, in particular the complainant, by attempting to influence them. The Magistrate, correctly in my view, accepted that there was no likelihood of the Appellant fleeing and that he would not interfere with the investigation which had almost been completed at that stage.

5. The matter was correctly decided *a quo* on the basis that the Appellant was facing a schedule 5 offence, namely rape. The provisions of sec 60(11)(b) of the Criminal Procedure Act, 51 of 1977 (*“the Act”*) are therefore applicable. That subsection reads as follows:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a);

(b) in Schedule 5, but not 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 the interests of justice permit his or her release.”

It was therefore required of the Appellant to prove on a balance of probabilities that the interests of justice permit his release.

See in this regard: **S v Yanta** 2000(1) SACR 237 (TK) at 241 b.

6. One of the factors which requires consideration and which plays an important role in a matter of this nature is the strength (or weakness) of the State’s case.

See in this regard: **S v Kock** 2003(2) SACR 5 (SCA) where Heher AJA (as he then was) observed as follows at 11 i to 12 a:

[15] In the context of s 60(11)(a) of the Act the strength of the State case has been held to be relevant to the existence of 'exceptional circumstances': There is no doubt that that strength (or weakness) must be given similar consideration in determining where the interests of justice lie for the purpose of s 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt. The case presented to the court of first instance fell into the second category. That should have been an important factor in the magistrate's evaluation of the application. Because of her misdirection no proper attention was paid to it.”

7. It must also be remembered at all times that the presumption of innocence in our law operates in favour of an accused person until

guilt has been established on the requisite onus of proof in court. This is so even where there is a strong *prima facie* case against an accused.

See in this regard:

S v Crossberg [2007] SCA 1993 (RSA) at par [13] note 1;

S v Kyriacou 2000(2) SACR 704 (O) at 712 e-f.

8. In the present matter, apart from the identification of Appellant and allegations of rape levelled against him by the complainant, there seems to be no other evidence on record linking the Appellant to the commission of the offence in question. The only evidence produced by the investigating officer is that used condoms were found on the scene and in the Appellant's motor vehicle. There is no indication if the Appellant is linked by forensic evidence to the alleged rape of the complainant through, for example, DNA evidence. Consequently it cannot be said that the State has a strong case against the Appellant at this stage. At best for the State it can be said that there is some evidence linking him to the commission of the offence. Such evidence must of course still be tested in a court through cross examination of the complainant.
9. Quite apart from the fact that the State does not appear to have a strong case against the Appellant, there is in my view another compelling reason why the Magistrate erred in dismissing the Appellant's bail application. Mr. Hollander, who appeared for the State, was driven to concede during argument that there was no evidence whatsoever linking the Appellant with the alleged attempted influencing or intimidation of the complainant, save for

the hearsay evidence of the investigating officer, inspector Mogosi. The evidence of Mr. Mogosi is unimpressive, because he made no serious attempts to follow up whether this person, Becay, in fact exists. During cross-examination on behalf of the Appellant it was vigorously denied that he knew such a person or that such a person worked for him at his tavern or at any other of his businesses.

What must be borne in mind (and this was very readily conceded by Mr. Hollander when I put it to him during his argument) is that not only the Appellant, but also the other two alleged rapists (and who had since been arrested by the police) had a motive to attempt to influence the complainant not to testify. Consequently, at best for the State it can only be said that the complainant is but one of three persons with a possible motive to influence the complainant to withdraw the charge.

10. It is clear from the foregoing that the Magistrate had misdirected himself in finding that the Appellant ought not to be released on bail. His motivation is quite unpersuasive as it appears in his judgment. After having given a detailed exposition of the law and the facts before him, the Magistrate abruptly concludes as follows:

“My finding would be that because of the evidence that there has been interference with the complainant, directly or indirectly, promises made to give her a substantial amount of money to withdraw the case, of particular concern is the involvement, directly or indirectly, of the Police or at least their suspected involvement in this case, which believes (*sic*) me to say that if the Accused is released on bail today, people will not have confidence in the legal system. For those reasons the bail

application is refused.”

11. The Magistrate quite clearly misconceived his function. Having examined the facts, and with proper application of the relevant legal principles, he should have been driven to the conclusion that the Appellant has made out a case for bail. Nothing in the passage from the judgment which I have quoted above, suggests any link between the Appellant and the alleged influencing or intimidation of the complainant. No such evidence was adduced, as I have stated earlier. To refuse bail on the basis of speculation or suspicion is wrong in law.
12. Consequently in the premises I held the view that the Magistrate’s decision was wrong and that his decision should be set aside and the Appellant be granted bail as is envisaged in sec 65(4) of the Act. I had consequently issued the order granting bail subject to the conditions as contained in the order.

**SA MAJIEDT
JUDGE**

FOR THE APPELLANT	:	ADV GW GALLOWAY
INSTRUCTED BY	:	HUGO MATTHEWSON & OOSTHUIZEN
FOR THE RESPONDENT	:	ADV Q HOLLANDER
INSTRUCTED BY	:	DPP