

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case Number: CA&R161/2024

In the matter between:

MCOSELELI MZONYWA

and

THE STATE

JUDGMENT – BAIL APPEAL

Beshe J

[1] This is an appeal against the refusal by the Magistrate, East London to admit the appellant to bail. The Appellant, a 61-year-old male person from Openshaw Village, Chalumna/Tsholomnqa, is facing charges of: Count 1 – Rape in contravention of Section 3 of Act 32 of 2007 and Count 2 – Attempted rape in contravention of Section 55(a) of Act 32 of 2007. The offences are alleged to have been perpetrated on a victim who is under the age of 16 years. It appears to have been common cause during the bail hearing that it was one to be conducted in terms of Section 60(11)(a) of the Criminal Procedure Act¹ since it involved an offence referred to in Schedule 6 of the Act.

[2] Having heard evidence from the appellant as well as Warrant Officer Jasi who was standing in for Investigating Officer, the Magistrate concluded that it would be risky to admit the appellant to bail. This was on 24 January 2024. He cited amongst other things that counted against the appellant; the fact that there appeared to be a

¹ Act 51 of 1977.

prima facie case that somebody did something to the complainant as would appear from the medical evidence. Appellant and the complainant stay in neighbouring houses. A possibility was raised of him moving elsewhere which may or may not solve the problem. The fact that the accused was drunk on the day in question. He expressed some reservations about appellant's mental state. The fact that appellant's concern about the safety of his home and his livestock in his absence cannot be categorised as an exceptional circumstance. Although elderly, he is not particularly so, so the Magistrate held.

[3] In broad strokes, the Magistrate's decision is impugned on the following grounds:

- He failed to properly consider whether the grounds listed in Section 60(4) of the Act are present in this matter.
- The Magistrate erred in holding that moving to a different address by the accused might not solve the problem, presumably of the risk of intimidation or undue influence to complainant should appellant return to his house which is next door to complainant's house.
- He failed to take account of appellant's personal circumstances together with the circumstances of the case which cumulatively dictated that exceptional circumstances existed that in the interest of justice permitted appellant's admission to bail.
- The Magistrate was dismissive towards the appellant throughout the hearing which unduly influenced him to properly consider appellant's case.

[4] The decision of the Magistrate is supported by the state on the following basis:

- Appellant's personal circumstances are common-place and do not constitute exceptional circumstances for purposes of Section 60(11)(a) of the Criminal Procedure Act.

[5] Both parties aptly outlined the principles that are applicable to bail applications governed by Section 60(11)(a) of the Criminal Procedure Act and referred the court to decided cases which were all helpful.

[6] Section 60(11)(a) provides that where an accused is charged with an offence referred to in Schedule 6, the court shall order that the accused be detained in custody until he/she is dealt with in accordance with the law, unless the accused adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release. Section 60(4) enumerates the grounds which if one or more are established, the interests of justice do not permit the release of the accused on bail. One such ground is the likelihood that accused will attempt to influence or intimidate witnesses or conceal or destroy evidence. In turn, Section 60(4)(c) provides that in determining whether this ground has been established, the following factors *inter alia* may be taken into account:

- accused's familiarity with the identity of witnesses/evidence.
- effectiveness and enforceability of bail conditions prohibiting communication between accused and witnesses.
- the relationship between the accused and witnesses and the extent to which they can be intimidated or influenced.

As I indicated earlier, it was common cause or not in dispute that appellant's home is next to that of the complainant. According to the stand in Investigating Officer Warrant Officer Jasi, information at state's disposal was that complainant did not report the rape immediately. She only did so a while later, weeks later when complainant's mother sent her on an errand to accused's place. She then stated that she was scared of going to accused's place. When asked why she was afraid of

accused, she disclosed that accused had raped her and threatened to kill her if she disclosed that to anyone.

[7] To determine whether exceptional circumstances exist, a court will consider the merits or facts of the case before it makes a judgment call based thereupon. Appellant's personal circumstances were placed before court presumably as constituting exceptional circumstances justifying his admission to bail as envisaged in Section 60(11)(a):

- The fact that he was 61 years old and therefore an elderly person.
- He was unmarried.
- He resides at Openshaw.
- He supports three children who are in Cape Town from his old age pension/grant of R2000.00 whose ages range between 33 years and 19 years.
- He is concerned about the safety of his house and livestock since there is no one left at his home to look after them.
- He has an alternative address being his sister's home and that he is willing to move to move to his sister's home together with his livestock.

There was however no evidence where in relation to complainant's home his sister's homestead was or what his sister's attitude was to the appellant's moving to her homestead.

[8] Appeals to the Superior Court with regards to bail are governed by Section 65 of the Criminal Procedure Act. Subsection (4) provides that a court or judge hearing the appeal shall not set aside the decision against which the appeal is brought,

unless such court is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its opinion the lower court should have given.

[9] In argument before me, the appeal assumed a somewhat different slant. Counsel for the appellant suggested that there was information that was not placed before the Magistrate during the bail application. That if such information was before the Magistrate, he would have found that exceptional circumstances which in the interest of justice justified his release on bail existed. That some of that information came to light when the contents of the docket became available. The fact that the legal representative who moved the bail application was a candidate attorney attached to LASA who did not do justice to appellant's case, resulting in appellant being under-represented. It being argued that this resulted in a miscarriage of justice. That had this not been the case before the Magistrate, he would have found that personal circumstances of the appellant together with the fact that the state has a weak case against the appellant would have swayed the Magistrate to conclude that there were exceptional circumstances warranting appellant's admission to bail. The issue of the Magistrate having expressed reservations about appellant's mental state without following that up in terms of Chapter 13 of the Criminal Procedure Act was also highlighted by appellant's counsel.

[10] It is noteworthy that it was not appellant's case before the Magistrate that the state had a weak case against him. Maybe this is due to the fact that the docket was not at hand yet, had not been disclosed to the appellant. But the fact of the matter is that this was not a factor the court was required to consider. This distinguishes the matter from that of *Twaie v The State*, Case Number A168/24, a decision of the Western Cape High Court to which I was referred by counsel for the appellant. In that case it was conceded on behalf of the state that at that stage "the strength of the state's case is questionable".

[11] Section 65(2) provides that an appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are placed before the Magistrate against whose decision the appeal is brought, and such Magistrate has made a decision against the accused on such new facts. I am inclined to agree with counsel for the respondent that the

appellant jumped the gun the correct forum to have approached was the Magistrate's court on the basis of new facts having emerged.

[12] In my view, the Magistrate's decision that there were no exceptional circumstances which in the interest of justice permitted appellant's release cannot be faulted.

[13] Accordingly, the appeal against the refusal to admit the accused to bail is dismissed.

N G BESHE
JUDGE OF THE HIGH COURT

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Date Heard : 18 October 2024

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