

SOUTH AFRICA / JUDGMENT

Clensie and Another v S (A2/2021)

[2021] ZAGPPHC 694 (30 August 2021)

[2021] ZAGPPHC 694**COURT**

North Gauteng High Court, Pretoria

BEFORE

MJ Mosopa

CASE / FILE NUMBER

A2/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

YES/NO

30/8/2021

Case number: A2/2021

In

the matter between:

WILLEM

JACOBUS

CLENSIE

1st

Appellant

ZANDRI

CLENSIE

2nd Appellant

V

THE

STATE

JUDGMENT

MOSOPA, J

1. The appellants were convicted of several counts under the Sexual Offences and Related Matters Amendment Act 32 of 2007, including rape, sexual assault, compelling or causing children to witness sexual acts and child neglect, in contravention of section 305(3) and 305(4) of the Children's Act 38 of 2005, and possession of drugs.
2. The appellants were sentenced to two (2) life imprisonment terms and further sentences ranging from two (2) to five (5) years imprisonment in respect of the other counts they were convicted of.
3. On 2 February 2021, the appellants brought an application for bail pending appeal before Magistrate Nel, in the Pretoria North Regional Court. This application for bail was refused by the court a quo, and aggrieved by this refusal by the lower court, the appellants brought an appeal against the refusal, in terms of section 65(1) of the Criminal Procedure Act 51 of 1977 ("the Act"). The matter served before me on 21 June 2021, at which time I reserved

judgment.

BACKGROUND

4. The appellants were convicted of sexual offences committed against the complainant, who is their biological daughter. They were also charged with sexual offences pertaining to their biological son, but they have since been acquitted of such charges, mainly because the complainant did not testify against the appellants.
5. The appellants were initially charged with possession of drugs and child neglect, in contravention of the Children's Act. They were then released on bail and further charges were added, some of which they have now been convicted of.
6. After their conviction, the appellants' bail was extended and it was only after being sentenced that their bail was revoked. The appellants were absent from court, during their trial, when they were either sick, even though at some stage the second appellant attended court when she could not even walk, or because of the National Lockdown Level 5. The State never applied for cancellation of the appellants' bail, even when these circumstances prevailed.
7. After the arrest of the appellants, their children were removed from their care and placed in the care of the Ms Smith. It was also a bail condition that the appellants not to have contact with their children.

8. It is agreed by both parties that because of the offences the appellants are convicted of, this matter falls within the ambit of Schedule 6 of the Act.
9. The appellants have an automatic right of appeal in respect of the two sentences of life imprisonment imposed by the court a quo.

LEGAL FRAMEWORK

10. Shongwe AJA, in the matter of *S v Bruintjies* 2003 (2) SACR 575 (SCA) made clear the approach to be taken by the court when dealing with an application for bail by an applicant convicted of a Schedule 6 offence and observed as follows;

"..the great majority of persons facing charges involving schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations such as, for example, the public safety. The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required is that the

court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence. The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold

if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be cast into the scale with factors favourable to the accused such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on."

11. In the *Bruintjies* matter (*supra*), the court held further that an applicant under such circumstances (where they are convicted of a Schedule 6 offence) cannot claim the benefit of a lighter test than that imposed in the case of a convicted person by section 60(11). The court stated that exceptional circumstances must be established without reference being made to the discretion provided by section 321.
12. In the matter of *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA), the court, when dealing with prospects of success in applications of this nature, held as follows;

"Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: R v Mthembu 1961

- (3) SA 468 (D) at 471A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction,

and real prospects that a non-custodial sentence might be imposed."

13. In the matter of S v Rohde (2019) ZASCA 193 (18 December 2019), the court when dealing with a bail pending finalisation of appeal, observed at para 6;

"[6] On conviction other considerations come to the fore. An increased risk of abscondment once a person has been convicted and sentenced to a lengthy term of imprisonment is inevitable. The severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail. The notional temptation to abscond (which confronts every accused person) becomes a real consideration once the length of the gaol sentence is known."

14. Section 60(4) sets out the circumstances where the interests of justice do not permit the release of the bail applicant from detention under certain jurisdictional factors, namely; the likelihood that the bail applicant, if released, will endanger the safety of the public (section 60(4)(a)); will attempt to evade trial (section 60(4)(b)); will attempt to influence witnesses (section 60(4)(c)); will undermine the proper functioning of the criminal justice system (section 60(4)(d)) and; will disturb the public order (section 60(4)(e)).

15. Section 60(11)(a) of the Act provides;

"[11] 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 a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release."

16. The same is applicable in bail applications pending appeal after sentence is imposed, as was clearly stated in S v Rohde (supra).

DISCUSSION

17. The appellants, after their arrest, were released on bail and as I indicated earlier, never defaulted on their appearances or on any of the bail conditions imposed by the lower court. Even after conviction, when their bail was extended, they complied strictly with their bail conditions.

18. The appellants adduced evidence in their bail applications by means of affidavits, in compliance with the provisions of section 60(2)(c) of the Act. What can be gleaned from the affidavits is the following;

18.1. Neither of the appellants are employed;

18.2. They will not have contact with the minor children and;

18.3. They will hand themselves over to the authorities within 48 hours, in the event that their appeal is not successful.

19. At the time of their arrest, the appellants explained why their house was in the state the police officers found it in - mainly that they were about to move out of the house they were renting. No explanation

was given as to where the appellants were going to stay after moving out or whether this was going to be a permanent relocation or not. The electricity, at that stage, had been disconnected and the house looked untidy. The bedrooms of the minor children were also in disarray, with no mattresses on the beds or the children seemed to be made to sleep on wooden beds without mattresses.

20. The appellants raised the issue of the procedure adopted by the lower court when determining their bail applications, in that the appellants' attorney was not given the opportunity to address the court after reading the affidavits into record, whereas the State was given an opportunity to do so, despite not having deposed to such affidavits or called any witnesses to oppose the bail applications.

21. A bail hearing is a judicial process that has to be conducted impartially and judicially and in accordance with relevant statutory and constitutional prescripts. What is important is that the court hearing the bail application must have reliable or sufficient information or evidence at its disposal to make a determination. Simply put, the procedure espoused by the provisions of section 60(2)(c) of the Act must be exhausted. The appellants were permitted to place such factors before court, by means of their affidavits and the failure of the below court to allow the appellants' attorney to address the court, does not amount to irregularity, in my view, as the address itself is not evidence as intended by section 60(2)(c).

22. The appellants also raised the issue of the competency of the child witness (the complainant) and that as such, she could not be admonished. Mainly, her competency was questioned because she said her surname is Smith, that she has two sisters or brothers, whereas she only has one brother and that her mother is Ms Estelle Smith. It must be noted that these are not the only questions the complainant was asked to determine whether she could distinguish between right and wrong, given her age, before she could be admonished to tell the truth. She was asked some other questions which she correctly answered and after such questions by the lower court, she was found to be competent to be admonished. It must also be noted that when her

parents were arrested, the child was placed in the care of Ms Smith, hence the fact that she referred to her surname as Smith.

23. Section 193 of the Act enjoins a court hearing criminal proceedings to decide any question concerning the competency or compellability of any witness to give evidence. The obligation to investigate the competence of a witness is extended to young (child) witnesses. Failure by the trial court to enquire into the capacity of the child witness, in casu a seven-year-old child, constitutes a serious irregularity in the circumstances of a particular case (see *S v Swart* 2009 (1) SACR (C) at para 20). I view the lower court not committing an irregularity, taking into account that the child was separated from the appellants

after their arrest and placed in the care of Ms Estelle Smith. When asked by the court as to who her parents are, she answered by saying that the appellants are her parents.

24. It was further contended that the minor child could not correctly and accurately answer questions and she cannot tell when the offenses were committed. Further, that she testified that she was penetrated with a stick in her anus but the description she gave of the object is not that of a stick. It cannot be ignored that when the child was examined, she was found to have an anal tear at 12 o'clock, which was older than 72 hours. Further, that when the children were found in the street, they were dirty and they had run away from the appellants' place of residence. If things were really normal, as the

appellants wanted the lower court to believe, the question which begs answer is why the children then ran away and informed strangers,

unknown to them, that the appellants did funny things to them?

25. The below court, when refusing the appellants bail, found that the appellants' position drastically changed after their convictions and sentences. Further, that there are no prospects of avoiding a custodial sentence, and even if the appeal court interferes with the sentence, the appellants will still serve direct and long imprisonment terms. The below court also found that no compelling and substantial circumstances exist in the case of the appellants. In considering that, I am of the view that the court below did not misdirect itself.
26. I do not see the appellants succeeding with their appeal in respect of conviction and even if the appeal court decides to interfere with their sentences, I do not see the appellants avoiding imprisonment. The appellants admitted using and being in possession of drugs and a sentence of two (2) years was imposed for this charge. The appellants were found guilty of child negligence and sentenced to five (5) years imprisonment, even though the appellants contended that they were convicted of an offence they were not charged with in terms of the provisions of the Children's Act.

ORDER

28. Having regard to the above, I make the following order;

1. The appeal against the refusal by the magistrate to grant the appellants bail pending the hearing of their appeal, is refused.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

Appearances:

For the applicant: Mr HW Moldenhauer

Instructed by: Moldenhauer Attorneys

For the respondent: Adv S Scheepers

Instructed by: The DPP

Date of hearing: 21 June 2021

Date of judgment: Electronically delivered

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Prepared on 10 October 2026 · Esheria