

SOUTH AFRICA / JUDGMENT

Kobese v S (CA&R34/2017) [2017] ZAECHGC 18 (23 February 2017)

[2017] ZAECHGC 18

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi

CASE / FILE NUMBER

CA&R34/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case No: CA&R

34/2017

Dates Heard: 16/02/2017

Date Delivered:

23/02/2017

In

the matter between: THABANG
 KOBESAppellant
 THABANG
 KOBES
 Appellant
 THE
 STATERespondent
 THE
 STATE
 Respondent

JUDGMENT

MALUSI J

[1] This is an appeal against the refusal by the Magistrate for the district of Grahamstown to admit the appellant to bail. The appellant is facing a charge of raping a fourteen year child involving three separate acts and a charge of assault with intent to do grievous bodily harm on another child. It was not in dispute in the court that due to the rape charge being listed in Schedule 6 the bail application was subject to section 60(11)(b) of the Criminal Procedure Act 51 of 1977 (the Act).

[1] This is an appeal against the refusal by the Magistrate for the district of Grahamstown to admit the appellant to bail. The appellant is facing a charge of raping a fourteen year child involving three separate acts and a charge of assault with intent to do grievous bodily harm on another child. It was not in dispute in the court

a quo

that due to the rape charge being listed in Schedule 6 the bail application was subject to section 60(11)(b) of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The appellant gave evidence in support of his application for bail. He testified that he is twenty years old and single. He has a two year old child residing with her mother. At the time of his arrest he had been paying R2000.00 per month towards maintenance of his child. The child also receives a State grant.

[3] The appellant testified that he was employed as a general labourer at Tissue Sotho in East London. He earns a wages of R2500.00 per month. He indicated that his position at work was still available at the time of hearing his bail application despite expiration of forty two days since his arrest. During the week he resides in his brother's flat in East London without paying any expenses and goes home to Grahamstown on weekends or at month-end. The appellant contributes R800.00 towards

maintenance of his mother at home.

- [4] The appellant gave evidence that the complainant is his [...]. He averred that the need to maintain his child and his mother amounts to exceptional circumstances.
- [5] Detective Constable Mabandla, the investigating officer, testified for the State to oppose the granting of bail. Mabandla tendered evidence that on 24 October 2016 the complainant and her two younger siblings aged thirteen years and ten years old were home alone without any adult supervision. Shortly after midnight the complainant was woken by her thirteen year old brother who reported that an intruder was inside their home. The intruder entered the bedroom and instructed the three children to move to the lounge. The intruder demanded personal items from the children.
- [6] Mabandla testified that it was at that stage that the children identified the intruder as the appellant. Apparently there was light emanating from the street light outside shining into the lounge. The appellant was acquainted with the children as he had been a neighbour for many years and used to visit their uncle. Mabandla gave evidence that the appellant later forced all three children back into the bedroom.
- [7] The appellant allegedly raped the complainant on two separate occasions whilst she was lying on the same bed as her younger siblings. The two acts were allegedly interposed by a further rape when the complainant was forced to sit on top of the appellant on a couch in the lounge. It is alleged the appellant stabbed the thirteen year old boy on his hand before leaving with the complainant for his room in the neighbourhood. The complainant was later rescued by the police and the appellant was arrested in his room.
- [8] According to Mabandla the medico legal report (commonly known as J88) noted abrasions on the complainant's vagina and anus. The findings were consistent with vaginal and anal sexual penetration.
- [9] Mabandla opposed bail as the complainants resided in the same area as the appellant. The complainants feared the appellant. The community members of Extension 6 where both the complainants and appellant reside compiled a petition and wrote a letter to the magistrate opposing the release of the appellant. Mabandla opined that the State had a strong *prima facie* case against the appellant. Mabandla was adamant that the appellant had said he is not working when she formally charged him at the police station.
- [9] Mabandla opposed bail as the complainants resided in the same area as the appellant. The complainants feared the appellant. The community members of Extension 6 where both the complainants and appellant reside compiled a petition and wrote a letter to the magistrate opposing the release of the appellant. Mabandla opined that the State had a strong

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case against the appellant. Mabandla was adamant that the appellant had said he is not working when she formally charged him at the police station.

[10] Section 65(4) of the Act provides that a Court hearing an appeal against a refusal to release an applicant on bail will not set aside the decision of the magistrate unless such Court is satisfied that the decision was wrong. The proper approach for the Court hearing the appeal was set out in *S v Barber*[1] as follows:

[10] Section 65(4) of the Act provides that a Court hearing an appeal against a refusal to release an applicant on bail will not set aside the decision of the magistrate unless such Court is satisfied that the decision was wrong. The proper approach for the Court hearing the appeal was set out in

S v Barber

as follows:

“It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate’s exercise of discretion. I think it should be stressed that, no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly . . .”

It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate’s exercise of discretion. I think it should be stressed that, no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly . . .”

[11] Section 60(11)(b) of the Act requires that an applicant for bail adduce evidence which satisfies the Court that exceptional

circumstances exist which in the interest of justice permit his release. It is a twofold enquiry which places the onus on the applicant to satisfy the Court on a balance of probabilities regarding:

- (a) The existence of exceptional circumstances; and
- (b) Such exceptional circumstances permit his release on bail in the interests of justice[2].

[12] Mr Sandi, who appeared for the appellant, criticized the quality of the ex tempore judgment given by the magistrate. The criticism is justified. It does not appear from the ex tempore judgment that the magistrate took into consideration all the facts placed before her, nor analysed them nor applied relevant legal

principles as the reasons are sparse. It is regrettable that she failed, despite repeated requests by appellant's attorney,

to comply with the peremptory requirement of section 65(3) of the Act to provide the reasons for her decision to this Court. The importance of furnishing written reasons cannot be overemphasised[3]. I shall revert later to some aspects of the ex tempore judgment.

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judgment.

[13] It was contended by Mr Sandi that the cumulative effect of the appellant's personal factors amount to exceptional circumstances. He referred specifically to the appellant's age; his lack of previous conviction and absence of pending cases; his employment in East London and prolonged absence from Grahamstown while at work.

[14] I agree with Ms Hendricks, who appeared for the State, that these personal factors do not amount to exceptional circumstances.

The true enquiry is whether the proven circumstances are unusual to permit the appellant's release. This does not mean that 'they must be circumstances above and beyond, and generally different from those enumerated in section 60(4) –

(9) of the Act. In fact, ordinary circumstances present to an exception degree, may lead to a finding that release on bail is justified[4]. Mabandla's evidence that the appellant said to her at the time he was charged he was unemployed was not disputed. That failure to dispute and to rebut Mabandla's evidence casts serious doubt on the appellant's allegation of employment. No corroborating evidence was adduced to support his allegation of employment in East London. I am of the view that the allegation

was probably a recent fabrication by the appellant.

[15] Mr Sandi assailed the State case against appellant as being "dubious". He questioned the complainant's

age as her birth certificate was not presented as an exhibit. He noted that the medico legal report (J88) was not submitted to Court to prove the alleged injuries on either charge. There was also no evidence of a knife being found in appellant's possession.

He then submitted that the complainants may change their evidence under cross-examination on trial.

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He then submitted that the complainants may change their evidence under cross-examination on trial.

[16] I find no merit in the attack on the State case against the appellant. The task of the court was to assess the *prima facie* strength (or weakness) of the State case. It was not to make a provisional finding of guilt or innocence[5]. A strong *prima facie* case against the appellant was presented by the investigating officer. Her evidence was unchallenged neither in cross-examination nor by the appellant. He only alleged that the complainant was his [...]. Even if I were to accept the allegation, such a relationship would not be a licence to repeatedly rape the complainant. The appellant eschewed giving any explanation for the charges against him despite having an opportunity to do so. The consequence of that choice is the acceptance of the overwhelming evidence against him.

[16] I find no merit in the attack on the State case against the appellant. The task of the court was to

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[17] Ms Hendricks correctly submitted that it was not in the interests of justice for the appellant to be released on bail. The strong *prima facie* case made the prospect of a long term imprisonment highly likely. Section 60(6)(h) of the Act provides for the Court to take that factor into consideration. The offence of rape of a child younger than sixteen years of age was a grave offence (See section 60(6)(f) of the Act). The appellant was familiar with the identity of the complainants who are young and vulnerable children (See section 60(7)(a) of the Act). The rape of the one child and assault on another induced a sense of outrage in the community. Their sense of peace and security was undermined (See section 60(8)(A) of the Act). Anyone of these factors militates against the release of the appellant.

[17] Ms Hendricks correctly submitted that it was not in the interests of justice for the appellant to be released on bail. The strong

case made the prospect of a long term imprisonment highly likely. Section 60(6)(h) of the Act provides for the Court to take that factor into consideration. The offence of rape of a child younger than sixteen years of age was a grave offence (See section 60(6)(f) of the Act). The appellant was familiar with the identity of the complainants who are young and vulnerable children (See section 60(7)(a) of the Act). The rape of the one child and assault on another induced a sense of outrage in the community. Their sense of peace and security was undermined (See section 60(8)(A) of the Act). Anyone of these factors militates against the release of the appellant.

[18] Mr Sandi submitted that section 28 of the Constitution provides that in any matter involving a child the best interests of the child are paramount. He argued that it was in the best interests of the appellant's child for him to be released to continue maintaining her.

[19] I do not agree. The evidence clearly shows that the appellant is not a primary caregiver. The child resides with her mother and maternal grandmother. The appellant's child will not be destitute due to his incarceration. She is already receiving a State grant. I must also take into account the best interests of the complainants who are also children. Their best interests far outweigh that of the appellant's child in the circumstances of this matter. The best interests of the appellant's child are not absolute and may not simply override all other legitimate interests, such as the interests of justice or the public interest. It is only one factor among many to be taken into account.[6] In my view the best interests of the appellant's child have to yield to the other legitimate interests.

[20] Another issue arising from the record calls for comment. The magistrate repeatedly used the term “OK” whilst

delivering her ex tempore judgment. She ought to desist as this informality detracts from the dignity and authority of the Court. She commented about the situation in the Grahamstown community where “. . . children are abandoned or raped by their parents, left to fend for themselves. . .” She then asked the rhetorical question whether other children would be safe if appellant were released in that situation. There was absolutely no evidence of such a situation nor is it such a notorious fact for her to take judicial notice of it. She said the comment is based on her four years residence in Grahamstown and her stint presiding in Children’s Court. The comment was unwarranted and may induce a sense of injustice on accused persons appearing before her.

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[21] The most egregious comment by the magistrate relates to a gender stereotype that may well be in violation of the equality clause in section 9(3) of the Constitution. In her ex tempore judgment she said “. . . we are living in a country whereby now we have animal, that group of animal men, men who are animals, are being named by our communities

as blessings, . . .” (sic). In my view the magistrate is in need of sensitivity training. I intend to order that her immediate superior ensures that she receives such training.

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In my view the magistrate is in need of sensitivity training. I intend to order that her immediate superior ensures that she receives such training.

[22] I am not satisfied that the magistrate’s decision was wrong and consequently the appeal must fail.

[23] I accordingly make the following order.

23.1 The appeal is dismissed.

23.2 The Registrar must ensure that a copy of this judgment is delivered to the Chief Magistrate, Grahamstown for the latter to facilitate sensitivity training for Magistrate Moni within a reasonable time from delivery of this judgment.

T MALUSI

Judge of the High Court

Counsel for the Appellant:

NJ Adv Sandi

Instructed by:

Mgangatho Attorneys

Grahamstown

Counsel for the Respondent: Adv S Hendricks

Instructed by:

Director of Public Prosecution

Date Heard:

16 February 2017

Date Delivered:

23 February 2017

[1]1979 (4) SA 218(D) at 220 E-H).

1979 (4) SA 218

[2]SeeS v Vanqa2000(2) SACR 371 (TK) at 376 h-j.

S v Vanqa

[3]S v Ntjaba2000 (2) SACR 218at 222 c-224 g, and the authorities cited therein;S v Mcoseli2012 (2) SACR 82 (ECG).

S v Ntjaba

2000 (2) SACR 218

S v Mcoseli

[4]S v Rudolph2010 (1) SACR 262(SCA) at para 9.

S v Rudolph

2010 (1) SACR 262

[5]S v Van Wyk2005 (1) SACR 41(SCA) at para 6;S v Mathebula2010 (1) SACR 55(SCA) at para 12.

S v Van Wyk

2005 (1) SACR 41

S v Mathebula

2010 (1) SACR 55

[6]S v M(Centre for Child Law as Amicus Curiae)[2007] ZACC 18;2007 (2) SACR 539(CC) at page 26 & 34 wherein a primary caregiver is defined as the person responsible for the child's day to day care and needs);S v Peterson2008 (2) SACR 355(C) at para 63-65.

[2007] ZACC 18

2007 (2) SACR 539

S v Peterson

2008 (2) SACR 355

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