

SOUTH AFRICA / JUDGMENT

M v S (A103/2022) [2022] ZAGPJHC 1035 (25 November 2022)

[2022] ZAGPJHC 1035**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

A103/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: A103/2022****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

25

/11/2022

In

the matter between:

J[...]

S[...] M[...]

Appellant

and

THE

STATE

Respondent

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an ap peal against the refusal by Regional Magistrate Mr Mhango, presiding in the Protea Regional Court, on 12 July 2022, to admit the appellant on bail.
- [2] The appellant is charged with two counts, namely kidnapping; and attempted rape.
- [3] Aggrieved by the decision, the appellant appealed to this Court against the refusal of bail. The grounds for such appeal are recorded in detail in the notice to appeal.

Background

- [4] The appellant's affidavit for purposes of the application for bail contained the following averments, namely:
 - (a) He was born on 25 January 1973 and is 49 years old.
 - (b) He does not possess a passport. He has no family or friends residing outside the borders of South Africa.
 - (c) He was arrested on 12 June 2022.
 - (d) Prior to his incarceration he was residing at [...], L[...], L[...]², Johannesburg.
 - (e) If granted bail, he will reside at an alternative address namely, [...] C[...] Street, P[...], Gauteng.
 - (f) He is married to Ms T[...].
 - (g) He is the father of 6 children born from different relationships. Two of the children are residing with their biological mother and four of the minor children are currently residing with him and his wife and they are attending school.
 - (h) He is the sole breadwinner.
 - (i) Prior to his arrest he was employed at C[...]², as a handyman and earned R8 000 per month.
 - (j) He will adhere to all bail conditions, if he is released on bail and he will not evade justice.
 - (k) He will not interfere with the state witnesses and/or the investigation in the matter.
 - (l) Save for the present matter, he has no previous convictions or any pending cases against him.

- (m) He has an amount of R5000 available for bail and he would report to the nearest Police Station if such conditions were to be imposed by the Court.
- [5] The prosecutor in the court a quo opposed the application. The investigating officer, Sergeant Skhotha's affidavit contained the following averments, namely,
 - (a) The appellant is facing a charge of kidnapping and attempted rape of a 12-year-old girl.
 - (b) The facts in the matter are that, on the day of the incident, 12 June 2022, the complainant was selling vegetables in the area where she resided. When she approached the appellant, he grabbed her, and dragged her into his house. The appellant locked the door, whereafter he pulled down the complainant's pants, whereafter he undressed his trouser. After being alerted of the incident by a friend of the complainant, the mother of the complainant proceeded to the house of the appellant. She requested the appellant to open the door of the house. Due to the fact that the appellant refused to open the door, she approached members of the community who assisted her. Following the intervention of members of the community the appellant opened the door and the complainant was let go.
 - (c) The appellant will be in danger if released on bail, because members of the community are enraged by his conduct.
 - (d) The appellant will interfere with the complainant and the state witnesses as they reside in the same area.
 - (e) Due to the seriousness of the charges against the appellant, he is a flight risk and will not attend his trial if released on bail.

Submissions

by the Appellant

- [6] Counsel for the appellant, Adv Milazi, argued that the Regional Magistrate failed to consider the personal circumstances of the appellant and concentrated more on the strength of the state's case.
- [7] Furthermore, the court a quo in its judgment relied on averments by the State, and expected the appellant to explain why he was implicated in the commissioning of the crimes. The appellant contended that there is no duty on him to disclose his defence during his bail application. Therefore, counsel for the appellant asserted that the Regional Magistrate during the bail application conducted a "mini-trial", and "convicted" the appellant during the bail application. Therefore, it was argued that the court a quo misdirected itself in that it failed to recognise that, in terms of section 35 of the Constitution, a person is innocent until proven guilty.

- [8] It was argued that the State did not prove that the appellant is a flight risk, nor that he will interfere with the state witnesses or the investigations in the matter. In fact, if bail is granted the appellant will reside at an alternative address, which address was confirmed by the investigating officer.
- [9] Counsel on behalf of the appellant contended that a proper case was made out. The appellant on a balance of probabilities did proof that it is in the interests of justice that he should be released on bail pending finalisation of his trial.

Submissions

by the Respondent

- [10] The respondent argued that the community is outraged by the offences committed by the appellant.
- [11] It was argued that the public's confidence in the bail system will undoubtedly be jeopardized if the appellant be released on bail.
- [12] Adv Kgaditsi argued that the court a quo did not pronounce on the guilt of the appellant during the bail application. She contended that the court a quo correctly considered the strength of the state's case against the appellant. The consideration of the strength of the state's case remains an important aspect that had to be considered, and in doing so, it is not to say that the court a quo has dealt exhaustively with the merits of the matter or made a finding of the guilt of the appellant.
- [13] The respondent argued that the bail court has a duty to take all aspects into consideration to come to a fair conclusion. The respondent conceded that the appellant is innocent until such time that a verdict of guilty is rendered against him, however the court should not lose sight of the fact that there is direct evidence that implicates him in the matter. Furthermore, the appellant did not take the court into his confidence, he did not offer an explanation as to why the complainant was inside his shack on the day of the incident during his bail application.
- [14] The respondent stated that the appellant's life will be in danger if released on bail. Furthermore, in dismissing the appeal, there will be no danger that the appellant will interfere with the witnesses in this matter, which is of concern, because they all reside in the same area.
- [15] Adv Kgaditsi conceded that the alternative address provided by the appellant was confirmed by the investigating officer, and the address is a distance from where the complainant and her mother reside. She furthermore confirmed that she was in contact with a person at C[....]2, Mr Ndlovu, who confirmed that the appellant will be able to return to his employment if released on bail.

- [16] However, the respondent argued that the appellant did not show that his release on bail would be in the interest of justice and therefore the appeal should be dismissed.

Legal Principles

- [17] Section 65 (1) of the Criminal Procedure Act, Act 51 of 1977 (“CPA”) provides that:

“(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

- [18] When deciding on the matter before me, I am alive to the provision in terms of Section 65(4) of the CPA which states the following;

“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.”

- [19] The provision above was considered and interpreted by Hefer J in *S v Barber*,^[1] where he held:

“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 for bail. 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 that would be an unfair interference with the magistrate’s exercise of his 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 exercised that discretion wrongly.”

- [20] In *S v Porthen and Others*,^[2] Bins-Ward AJ (as he then was) focused on the appeal court’s right to interfere with the discretion of the court of first instance in refusing bail when he held:

“When a discretion... is exercised by the court a quo, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong....”

- [21] It is common cause that the charge falls in the category of offences listed in schedule 5 of the CPA. In respect of Schedule 5 offences, the onus is on the appellant to satisfy the court on a balance of probabilities, that the interests of justice permit his release on bail. In respect of the test for interests of justice, the bail application must start on the premise that the continued detention of the appellant is the norm.^[3]

[22] Section 60 (11) (b) of the CPA states the following:

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

- (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.”

[23] Section 60(4) of the CPA provides that:

“The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;
- (b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;
- (c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- (d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

[24] In applying the provisions of section 65(4) of the CPA, the court hearing the bail appeal must approach it on the assumption that the decision of the court a quo is correct and not to interfere with the decision, unless it is satisfied that it is wrong.[4]

Evaluation

[25] The appellant’s first hurdle is that he now bears an evidential burden of showing that he has to proof on a balance of probabilities that it is in the interests of justice for him to be released on bail, pending the outcome of the trial.

[26] This Court cannot lose sight of the fact that the respondent is opposing this appeal.

- [27] I will evaluate the matter before me, with the matter of *S v Smith and Another*[5] in mind, where the Court said that ‘the court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.’ The essence therefore of the principles and considerations underlying bail is that no one should remain locked up without good reason.
- [28] In this matter the test appears to be whether there is a likelihood that the appellant would evade trial. The strength of the State’s case and the probability of conviction, although an important consideration, does not displace the central issue which the court is required to decide, which is, whether or not the interests of justice permit the release on bail of the appellant.
- [29] It is important to note that there was a duty on the court a quo in the bail application to assess the prima facie strength of the state case against the bail applicant, as opposed to making a provisional finding on the guilt or otherwise of such an applicant.[6] It is paramount that bail proceedings are not to be viewed as a full-dress rehearsal of the trial, but that should be left for the trial court. The Constitutional Court in the matter of *Dlamini supra* acknowledged the unique nature of bail applications when it held;

“Furthermore a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict

rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court.

The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.” [my emphasis]

- [30] As far as the strength of the case against the appellant is concerned, I acknowledge that the complainant was found with the appellant, inside his house. Furthermore, the door of the house was locked and the mother of the complainant alerted members of the community that her daughter was with the appellant inside the house, only after the community intervened, the appellant unlocked the door and the complainant was released. It is common cause that the complainant was not physically injured.

[31] I am of the view that the court a quo placed enormous weight on whether the appellant was guilty of the offences or not, and it is of the utmost importance that what our law requires is that a bail magistrate, like any judicial officer presiding over a trial, should conduct proceedings open-mindedly,

impartially and fairly, and that such conduct must indeed be manifest to all concerned, especially the bail applicant.[7]

[32] I have to consider the views of the community relating to the seriousness of the offences against the appellant. It cannot be ignored that offences involving children are seen in an extremely serious light. It is the duty of the Court, as upper guardian of children, to protect children from abuse, violence and things that could harm them. All children have the right to grow up in a safe and secure environment. The complainant in the matter was 12 years old during the incident. She must have been traumatised by the incident. It is of the utmost importance to this court that her safety should be guaranteed while the matter is pending before court. Furthermore, I have to consider the probability of the appellant interfering with the complainant because they are residing in the same area.

[33] If the appellant is released on bail, there must be certainty that he will attend court proceedings and that he will not abscond.

Furthermore, that he will not jeopardise the justice system in any way.

[34] All the above factors must be carefully balanced with the personal circumstances proffered by the appellant. The appellant is 49 years old, employed and the breadwinner of his family. He supports his 4 minor children currently attending school. I have to consider that welfare of his minor children as well. They will be left without financial support if the appellant is to be incarcerated until the finalisation of the trial. It is evident that the trial will only proceed in 2023.

[35] The employer of the appellant confirmed that he can return to his employment, even though he has been absent from work since his arrest in June 2022. Currently the unemployment rate in South Africa is of a major concern, and surely should be a factor to consider in this appeal. The appellant played open cards with his employer, in that he was arrested and this can be seen as in a positive light when deciding on the release of the appellant on bail or not.

[36] The appellant furthermore, made arrangements to relocate to an alternative address in order to secure the complainant's safety

and to not further traumatise her with him being released. He is prepared to adhere to strict conditions if released on bail,

amongst others to report to the nearest Police Station, which in itself indicates his appreciation of the seriousness of the offences

his charged with.

[37] After all, it is clear that, ‘Developments in South African bail law since 1994 have tried to ensure that bail is granted in circumstances which balance the risk of harm which the [accused] could cause to the victim/s, witnesses and the integrity of the justice process, on the one hand, with the rights of an accused person to the presumption of innocence, on the other’.[8]

[38] Based on the above, I am of the view that the court a quo erred in deciding to dismiss the appellant’s application for admission to bail pending his trial. Consequently, the court finds that there is cause for interference with the decision of the court a quo and to permit admittance of the appellant on bail.

[39] In the result, the following order is made:

1. The appeal is upheld.
2. The appellant is admitted to bail at an amount of R8 000,00 (Eight Thousand Rand), on the following conditions:
 - i. That he may not leave the Province of Gauteng, without written notice to and permission of the investigating officer in this matter, Detective Sergeant Skhotha or the Station Commander, stationed at L[....]2 South Police Station.
 - ii. That he may not make contact, directly or indirectly with the following state witnesses, B[....] M[....]2 and K[....] N[....], residing at N[....]2, L[....]2.
 - iii. That he will, on his release on bail, relocate to [....] C[....] Street, P[....], Gauteng, where he will remain until the criminal proceedings relating to this matter is finalized.
 - iv. That he will report on to the L[....]2 Police Station, on Monday and Friday between 18h00 and 21h00 until the finalisation of the matter.
 - v. That he will appear in the Protea Regional Court on 6 December 2022 at 8h30. If he fails to appear on the said date, a warrant of arrest will be issued, he will be arrested and the bail amount paid will be forfeited to the State.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to Case Lines and by release to SAFLII. The date and time for hand down is deemed to be 10h00 on 25 November 2022.

DATE OF HEARING: 24

November 2022

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[1] 1979

(4) SA 218 (D) at 220 E-F.

[2] 2004

(2) SACR 242 (C) at para 11.

[3] S v Dlamini; S v Dladla & Others; S v Joubert, S v Schietekat [1999] ZACC 8; 1999 (2) SACR 51 (CC) at 84c-e and 85.

[4] S v Mbele & Another 1996

(1) SACR 212 (W) at 221H-I, The appeal court will interfere if the magistrate overlooked some important aspects of the case or unnecessarily

overemphasized others, in considering and dealing with the matter – See S v Mpulampula 2007

(2) SACR 133 (E); State v Essop 2018

(1) SACR 99 (GP) at para [23].

[5] 1969

(4) SA 175 (N) at 177e-f.

[6] S v Van Wyk 2005

- (1) SACR 41 (SCA).
- [7] A Paizes (ed) Criminal Justice Review 1 of 2017 (Cape Town: Juta 2017).
- [8] J Burchell and A Erasmus (ed) Criminal Justice in a New Society (Cape Town: Juta 2003) at 163.
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