

SOUTH AFRICA / JUDGMENT

# Mabale v S (A120/2023) [2023] ZAFSHC 312 (11 August 2023) [2023] ZAFSHC 312

## COURT

Free State High Court, Bloemfontein

## BEFORE

Mhlambi

## CASE / FILE NUMBER

A120/2023

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case number: A120/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO  
MAGISTRATES:YES/NO  
In

the matter between:

REGINALD  
MABALE  
Appellant  
and  
THE  
STATE  
Respondent

**JUDGMENT**

BY: MHLAMBI J,

HEARD ON: 4 August 2023.

DELIVERED ON: 11 August 2023

- [1] The appellant stood arraigned in the magistrate's court on a charge of rape where, on 23 March 2023, he was refused bail on the two grounds that he was a flight risk and a threat to the safety of the complainant.
- [2] The application was opposed by the state whose resistance was ensconced in the provisions of section 65(4) of the Criminal Procedure Act 51/1977, ("the Act"). The state implored the court to find that the court a quo's decision not to grant the appellant bail was not wrong and should therefore not be set aside.

- [3] The grounds of appeal are set out as follows in the notice of appeal:

*"3.1 The Honourable court misdirected itself by finding that the interests of justice do not permit the release of the appellant on bail.*

3.2 The Honourable Court misdirected itself by finding that the appellant is facing an extremely strong case and that if convicted the appellant is going to prison for life.

3.3 The Honourable Court misdirected itself by finding that there is a great possibility or probability that the appellant will disappear should he be granted bail. In so doing, the court failed to consider the following evidence of the appellant which has not been disputed by the respondent:

3.3.1 That the appellant went to his family to seek for their support and encouragement.

3.3.2 After meeting his family he came back to his place and with the support of his wife, the appellant arranged to see the investigating officer and to hand himself over to the investigating officer.

3.3.3 That the investigating officer was not available on the day that was arranged with the investigating officer for the appellant to hand himself to the police.

3.3.4 That the appellant indeed handed himself over to the investigating officer the following day, upon the return of the investigating officer.

3.4 The court misdirected itself by finding that there is a great possibility or probability that the appellant would threaten the safety of the Complainant should he be admitted to bail. In doing so, the court failed to consider the following:

3.4.1 That there is no evidence before Court that the appellant indeed threatened the Complainant.

3.4.2 That according to the evidence of the investigating officer, the complainant allegedly came across the appellant three to four times prior to the arrest of the appellant. Notwithstanding these allegations, there is no evidence that the appellant threatened the complainant or spoke to her or influenced her.

3.5 The decision to deny the appellant bail is accordingly wrong and stands to be set aside with the result that the appellant's bail be reconsidered and the appellant be admitted to bail."

- [4] The appellant, as the accused in the proceedings in the court a quo, had neither previous convictions nor pending cases. As the complainant was not under the age of 16, the offence was one referred to in Schedule 5 and triggered the provisions of section 60 (11) (b) of the Act which provide that the court shall order that the accused be detained in custody until he 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 release.
- [5] The appellant led the evidence of three witnesses: his wife, his superior, Captain Sykes, and himself. The state relied on the testimony of the investigating officer, Sergeant Z Van Vellum. In brief, the appellant's testimony was that he had carnal relations with the complainant with her consent and that he was of intention to plead not guilty to the charge in the ensuing trial. He did receive a telephone call that informed him that he was accused of rape and should report himself to the police. He regarded the call as a scam and blocked the number.
- [6] He was a soldier at the Tempe Military base for the past 14 years and had had no disciplinary actions against him. He was married with 3 children, one child having been born outside wedlock. He earned a gross salary of R 18 000.00, leaving him a net income of R 12 000.00. Apart from his family, he maintained his father and sister. The two children born of the marriage were 16 and 11 years old. Both the elder child and the wife had psychological problems for which they received treatment.
- [7] Months after the incident while he was on leave, and two weeks before the bail hearing, he was summoned to his workplace by his superiors, who informed him that the police were looking for him. He was scared, afraid and saw his life changing as he thought of his wife and children. At work, he motivated and assisted his colleagues. He thought his life was over and needed some time alone. He could not discuss this problem with his wife then. He left the place of employment and sought the advice of his father who stayed outside of Bloemfontein. Later, his wife came to know of his problem.
- [8] Having consulted with his family and sister, he returned to Bloemfontein and handed himself over to the police. His wife was in constant communication with the investigating officer. Captain Sykes testified that the appellant, before the police could arrive at the military base, was talking to his lawyer on the telephone. He was very distressed at the time, confused, scared and out of his mind. They tried to calm him. It was the first time for him to see the appellant in that state as it was obvious that a lot of things were going through his mind. The appellant was not a person that runs away and for the past 4 years, he was never

absent from work without leave.

- [9] In a nutshell, the essence of the state's case is founded on the following evidence of the investigating officer:

*"Miss Van Vellum: I am opposing bail, Your Worship, against the suspect. The victim's safety on this matter is a priority, Your Worship, because I believe the suspect knows the victim well, so should he be released the possibility of him threatening the victim is there, Your Worship. Also, on the fact that the sister was even proposing they meet up with the family which places my victim at risk, Your Worship, and also, I want to place before this court that it took plus, minus four months to find the suspect, Your Worship. Should he be released now, what are the guarantees of him complying? Will he not run away again, your Worship? And those are my reasons that I place before the court, your Worship."*

- [10] In its judgment, the court a quo stated that:

*"If I look at the strength of the state's case, and the incentive to evade trial, that is also something that we take into account in deciding whether he is a flight risk. This case that he is facing of rape is a strong case. I am not going to go into the merits to say exactly why I say so, because the trial court will deal with that. But he is facing an extremely strong case of rape. If he is convicted of this offence, he is going to prison for life. That is a very long time."*

- [11] In summing up, the court a quo stated that:

*"His wife and his sister, all of them had to motivate him to come to the police and to hand himself over. He was also eventually forced by the circumstances when the investigating officer said, well I am going to circulate him. He is going to be a "wanted" man. So, they used that to try and motivate him to rather come to the police station to face the music, but his intention all the way was to avoid this case. He also tried to get his sister to influence the witness, to make contact with the family so that they can make this case go away as correctly pointed (sic) by the state, sweeping it under the carpet."*

Now we do not know what is going to happen now, that he knows all the facts and that he now knows that he is facing life imprisonment. All his other attempts to try and make- get this case to go away failed. There is a great possibility or a probability, a great probability he will either disappear again or threaten the safety of the complainant, after today.

So, for those reasons, I find that it is not in the interest of justice that bail be granted. He must be kept in custody until this case is finalised and therefore bail is refused."

- [12] It is therefore evident that the state's case hinges on the establishment of the grounds in section 60 (4)(b) and(c) of the Act which provides that the interests of justice do not permit the release from detention of an accused if there is the likelihood that he would attempt to evade his trial when released on bail or would attempt to influence or intimidate witnesses or conceal or destroy evidence.

- [13] Sections 60

(6) and (7) enjoin the court to consider the factors contained therein to establish whether the grounds in section 60 (4)(b) and (c) are established. It is also clear from the record that the court a quo did consider the factors mentioned in section 60 (6) of the Act. However, it is not clear whether the court did consider the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached. Similarly, there was scant or no consideration whatsoever of how effective and enforceable bail conditions prohibiting communication between the accused and the witness were likely to be.

[14] It is indeed so that the appellant failed to wait for the police at his workplace and disappeared for a period of time before he surrendered himself to the police. This disappearance should be viewed in context, taking into account the appellant's explanation and the testimony of Captain Sykes.

[15] Both the state witness and the court talked of the possibility that the appellant might not attend his trial and threaten the

complainant. It would also appear that, on perusing the record, the court a quo did not appreciate the difference between a possibility

and a probability. The legal authorities are clear that a court should not grope in the dark and speculate; a court must make a

finding on the probabilities. Refusing bail merely because there is a risk or a possibility that one or more consequences in section 60(4) of the Act will result, is not in the interests of justice. If the court cannot find that one or more of the consequences will probably occur, then the detention of the accused is not in the interests of justice and he should be released.[1]

[16] There is no evidence on record that the appellant threatened the safety of the complainant. The allegation by the investigating officer that the appellant's sister indicated to her that she would like to meet the complainant and her family does not justify the conclusion that he intimidated or threatened her safety.

[17] It is not clear why the court a quo was of the view that the appellant faced an extremely strong case as it did not divulge the reasons. It is also not clear what was the "incentive to evade trial" that should be taken into account in determining whether the appellant was a flight risk. The applicant's defence is based

on consent. He testified that the complainant gave him her phone numbers freely and voluntarily, whereupon he phoned her the following

day after the incident. The complainant, in her statement, stated that she gave him the numbers after he dropped off her friends when he forcefully requested them. This allegation by the state that the numbers were forcefully requested was denied by the applicant in cross-examination and he pointed out that it would be unreasonable of him to phone the complainant a day after he had allegedly forced himself upon her.

[18] According to the investigating officer, the complainant gave the applicant the phone numbers after he had driven with her to an open space near a pub and church. He had locked the car doors, pushed the complainant's chair, lifted her mini skirt and, when she thought he was about to rape her, she then gave him the numbers. The locality and the circumstances where the incident took place, the time when the phone numbers were given and the subsequent telephone call may have a bearing on the defence put up by the appellant.

[19] Having considered the evidence led by the appellant in the court a quo, I am satisfied that the interests of justice permit his release. I am also not persuaded that the appellant is a flight risk. There is no evidence that he will influence and intimidate witnesses. He testified that if bail were granted, he would abide by the strictest

bail conditions, report before and after work, on weekends and post a high bail. I am of the view that the imposition of appropriate bail conditions will limit the risks that he may not attend his trial. The appeal should therefore succeed and the appellant granted bail with appropriate bail conditions.

[20] I, therefore, grant the following order:

Order:

1. The appeal is upheld and the magistrate's order refusing bail is set aside.
2. Pending the outcome of the trial, the appellant is granted bail in the amount of R 10 000.00.
3. The appellant's release is subject to the following:
  - 3.1 The appellant must appear in the Bloemfontein magistrate's court on each and every date to which his trial has been remanded.
  - 3.2 The appellant shall report to the Park Road Police Station daily between the hours of 05h00 in the morning and 19h00 in the afternoon;
  - 3.3 The appellant shall not directly or indirectly have contact with any state witnesses;
  - 3.4 The appellant shall not leave the area of Bloemfontein without the written permission of the investigating officer;

JJ MHLAMBI, J

Counsel for the applicant: Adv. B Dlamini Instructed by: Wesi Attorneys 107 Zastron Street  
Westdene Bloemfontein Counsel for the respondent: Adv. Tshefuta Instructed by: Director of  
Public Prosecutions Waterfall Building Bloemfontein

[1] S v Swanepoel 1999 (1) SACR 311 (O). S v Acheson 1991 (2) SA 805 (NmH).

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Prepared on 10 October 2026 · Esheria