

SOUTH AFRICA / JUDGMENT

Mahlangu v S (A264/24) [2024]
ZAGPPHC 1086 (24 October 2024)
[2024] ZAGPPHC 1086

COURT
North Gauteng High Court, Pretoria

BEFORE
Lesufi

CASE / FILE NUMBER
A264/24

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IN
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, PRETORIA
CASE NUMBER: A264/24
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED.

DATE:	24 OCTOBER 2024
	SIGNATURE
	In
the matter between:	SEMZAMI
	LUCAS MAHLANGU
	APPELLANT
	and
	THE
	STATE
	RESPONDENT

Delivered: This Judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/ their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 24 October 2024.

JUDGMENT

LESUFI, AJ

Introduction

- [1] This is an appeal against the refusal of a bail by the Ekurhuleni District Magistrate Court (the court a quo) on 30 May 2024. The Appellant was charged with rape of a minor in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”).
- [2] The Appellant appeared in the said court as Accused 1. He appeared together with the mother of the complainant and another person. The mother of the complainant and the other person have since been admitted to bail.

Background

- [3] The allegations against the Appellant arose in 2016 when he collected the complainant from school. The Appellant raped the complainant on more than one occasion and at the time of the alleged rapes the complainant was seven years old.
- [4] It is also alleged that at the time of the rapes, the mother of the complainant and the Appellant lived together. The mother of the complainant is facing a charge relating to her alleged failure to report the allegations reported by the complainant to her.
- [5] After his arrest, the Appellant applied for bail in the court a quo. It is common cause that the application for bail was in terms of section 60(11) (a) of the Criminal Procedure Act 51 of 1977 (“the CPA”).
- [6] The application for bail by the Appellant was unsuccessful. The court a quo found that the Appellant failed to prove that there are exceptional circumstances that permit his release on bail in the interests of justice.
- [7] Aggrieved by the decision of the learned Magistrate, the Appellant appealed against the decision of the court a quo in terms of section 65 of the CPA.
- [8] The Appellant raised the following grounds for appeal, namely:

- 8.1 that the court a quo erred in not attaching the required weight to the Appellant 's personal circumstances.
- 8.2. that the court a quo erred in refusing to release the Appellant despite the absence of factors as stipulated in section 60(4) (a) –(e) of the CPA;
- 8.3 that the court a quo erred in disregarded the prejudice the Appellant's dependents will suffer as a result of the refusal for the Appellant's bail application
- 8.4. that the court a quo erred in disregarding the common meaning of the term interest of justice;
- 8.5. that the court a quo erred to adequately consider the imposition of bail conditions as an alternative to the refusal of bail;
- 8.6. that the court a quo disregarded to adequately consider any other appropriate bail conditions to remedy any concern it might have as an alternative to the refusal of bail;
- 8.7. that the court a quo erred by not considering the Appellant's constitutional right to be presumed innocent until proven guilty;
- 8.8 that the court a quo erred in finding that the Appellant and his co-accused intimidated the complainant in spite of the absence of evidence in support thereof ;
- 8.9. that the court a quo erred in not considering the weakness of the State's case, it erred by not considering the concessions made by the investigating officer, the common cause aspects impacting adversely on the state's case, the fact that the state's case is based on a single witness; the absence of medical evidence and the period that has lapsed since the alleged commission of the crime, the complainant's character and pattern of filing charges, the absence of forensic and DNA evidence and the proposed unrebutted motive for filing of false charges by the complainant;
- 8.10. that the court a quo erred in acknowledging that bail is non penal in nature;
- 8.11. that the court a quo erred in not holding on a conspectus of probabilities that the "interests of justice" permit release of the Appellant; and
- 8.12. that the court a quo erred in not holding that exceptional circumstances have been established

[9] The Appellant submitted that there is a bulk of evidence placed before the Honourable Court, that will prove that the Appellant has succeeded in proving exceptional circumstances. In support of this, the Appellant relied on *S v Botha & 'n Ander*[1] and *S v Rudolph*,[2] which held that there is no need for exceptional circumstances to be above and beyond and generally different from those enumerated in section 60(4) – (9). Present ordinary circumstances may lead to a finding that the release on bail is justified.

[10] The Respondent contented that the court a quo dealt fully with the aspects of the law and supports the refusal to admit the Appellant to bail. The discretion of the learned Magistrate was exercised correctly and there was no misdirection in refusing the application for bail.

The law

[11] Section 60(11) (a) of the CPA states:

“(11) Notwithstanding any provision of the Act, where an accused is charged with an offence -:

(a) referred to 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 interests of justice permit his or her release;”

[12] The approach to a bail application governed in terms of the provisions of section 60(11)(a) was dealt with by the Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*[3] where Kriegler J held as follows:

"However, section 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by sections 60(4) - (9) (and required by section 35(1)(f) in which the interest of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interest of society. Section 60(11) (a) contemplates an exercise in which the balance between the liberty interests of the accused and the interest of society in denying the accused bail will be resolved in favour of the denial of bail unless 'exceptional circumstances' are

shown by the accused to exist. This exercise is one which departs from the constitutional standards set by section 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interest of justice' were to be applied.”[4]

[13] At paragraph 61 the court held that

"The subsection says that for those awaiting trial on the offences listed in Sch 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss (4) to (9) has to be applied differently. Under ss (11) (a) the lawgiver makes it quite plain that a formal onus rests on a detainee to 'satisfy the court'. Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued

detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that 'exceptional circumstances'

exist. All of this, so it was submitted, rendered the subsection an effective bar to persons charged with Sch 6 offences being released on bail, and consequently infringed their constitutional right to a just evaluation of their claim for release from custody pending trial. (my emphasis)"[5]

[14] An applicant for bail in terms of section 60(11) (a) bears the onus to prove on a balance of probabilities that there are exceptional circumstances which in the interests of justice permit his or her release on bail. Such an applicant for bail has a right to be given a reasonable opportunity to do so and can prove the existence of such exceptional circumstances by testifying under oath and/or calling witnesses or presenting his or her evidence by way of submitting statement or statements in writing under oath[6].

[15] As to what exactly "exceptional circumstances" are, Horn AJ in *S v Jonas*[7] held:

"The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g he has a cast-iron alibi, this would likewise constitute an exceptional circumstance."[8]

[16] In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*,[9] above, it was held that exceptional circumstances do not have to be over and above, and different from, the factors listed in section 60(4) - (9).The cumulative effect of the facts placed before the court considering an application for bail must be considered by the court.

[17] In *S v Bruintjies*[10] Shongwe AJA (as he then was) said the following about the term exceptional circumstances:

"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."[11]

[18] In so far as the weakness of the State's case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*[12] held that:

"...In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge..."[13]

[19] In the matter of *S v Smith and Another*,[14] the Court held that:

"[T]he 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".[15]

[20] In the matter of *S v Rudolph*,[16] the Supreme Court of Appeal stated that in respect to schedule 6 offences:

“The section places an onus on the appellant to produce proof that exceptional circumstances exist which in the interests of justice

permit his release. It contemplates an exercise which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist”.[17]

Evaluation

[21] Presumption of innocence is an important consideration, but a court needs to look holistically at all the circumstances presented in a bail application. The personal circumstances of the Appellant are that:

21.1. He is 62 years of age and a South African Citizen and resident in Nigel, divorced and living with his girlfriend of 14 years and 3 minor children, his 2 children, 6 grandchildren and 1 greatgrandchild. His family is financially dependent on him.

21.2. He is the sole breadwinner of his family.

21.2. He is self-employed and also the provider of employment to 10 employees who generate approximately R12 000,00 per month

21.3. The Appellant has entered into a 5-year lease agreement on a farm. His presence on the farm on a daily basis is of utmost importance to instruct the workers on the planting and cultivation of the crop in order to generate an income. If the farm does not generate an income the appellant will be unable to comply to the financial obligations.

21.4. The Appellant has additional financial obligations, which he will be unable to comply to if not released on bail which involve immovable properties to the value of R1 000 000.00 and other properties in Benoni.

21.5. The Appellant does not have any previous convictions, neither does he have any outstanding cases. There is no protection orders issued against the him in terms of the Domestic Violence and Harassment Acts.

[22] Section 65[4] of the CPA provides that a court or judge hearing an appeal against the refusal of bail shall not set aside the decision of the lower court unless the court or judge hearing the appeal is satisfied that the decision of the court a quo was wrong. If the court of appeal finds that the decision of the court a quo was wrong, the court of appeal will be at large to give the decision which in its opinion, the lower court should have given. The functions and powers of the court or judge hearing an appeal under section 65 of the CPA are similar to those in an appeal against

conviction and sentence.[18] This outline of the powers of the court of appeal does not create a limitation greater than that which exists in any other criminal

appeal. In criminal appeals the finding of the lower court is only set aside if the court of appeal believes that the finding of the lower court was wrong. If there is any doubt, the court of appeal does not interfere. This criterion has been settled by law for a long time.[19]

[23] In *S v Barber*[20] Hefer J (as he then was) remarked 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 that would be 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 but exercised that discretion wrongly... Without saying that the magistrate’s view was actually the correct one, I have not been persuaded to decide that it was the wrong one.”[21]

[24] In *S v Green & Another*[22] it was confirmed that where a court of appeal sets aside a magistrate’s refusal to grant bail, it is obliged in terms of

section 65(4) to give the decision which the magistrate should have given.

[25] In *S v Porthen & others*[23] Binns-Ward AJ said that there could “be no quarrel with the correctness of the observations of Hefer J as a general proposition”.

The court also stated with reference to *S v Botha en ander 2002 (1) SACR 222 (SCA)*:

“Insofar as the quoted dictum in S v Barber (supra) might be amendable to be construed to suggest that the appellate court’s power to intervene in terms of section 65(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him- or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of section 60(11) (a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with Botha’s case supra. See paras [21] to [27] of the judgment. It is clear that the appeal court undertook its own analysis of the evidence and came to its own conclusion that appellants had not discharged the onus on them in terms of s 60(11)

(a) of the CPA. (The fact that the appeal in Botha’s case was an appeal from a decision of a bail application by the High Court as the court of first instance does not affect the principle in issue.”[24]

- [26] The Appellant bears the onus to satisfy the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.[25] A mere denial of the considerations and/or probabilities of events, as contained in s60(4) – (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.
- [27] The Appellant who bore the onus to prove on a balance of probabilities that exceptional circumstances which in the interests of justice permit his release on bail exist, also presented his case by way of submitting an affidavit deposed to by him. The Appellant submitted that the case against him is weak. It has authoritatively been held that evidence produced by way of affidavit in bail applications is admissible.[26]
- [28] The question that arises is whether evidence in the form of an affidavit is of sufficient probative value to assist an applicant in a bail application to prove that the case against them is weak or put differently, that his or her chances of being acquitted on the charge are real and therefore it would not be in the interests of justice to detain them pending the finalisation of their trial. It has authoritatively been held in *S v Pienaar*[27] that an affidavit will have less probative value than viva voce evidence that is subjected to cross-examination.
- [29] Even though an applicant for bail in terms of section 60(11) (a) bears the onus to prove on a balance of probabilities that exceptional circumstances that warrant their release on bail in the interests of justice exist, the prosecution is not expected to play a passive role in such applications for bail but must place relevant information before the court considering the application for bail.
- [30] In *Carmichele v Minister of Safety and Security*[28] the Constitutional Court held that prosecutors have always owed a duty to perform their public functions publicly and in the interests

of the public. The court went further and stated:

“Although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal and, if granted, any appropriate conditions attaching thereto”[29]

- [31] In *S v Mathebula*[30] above the court stated that:

“But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order to successfully challenge the merits of such a case in bail proceedings an applicant needs to go further; he must prove on a balance of probability that he will be acquitted on the charge” *S v Botha en 'n Ander* 2002

- (1) SACR 222 (SCA) (2002)
- (2) SA 680; [2002] 2 All SA 577) at 230h, 232c; *S v Viljoen* 2002

(2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c.”[31]

[32] The prosecution placed on record all the information regarding allegations against the Appellant by presenting the evidence of the investigating officer Inspector Jacobs the police official tasked with the responsibility to investigate the case against the Appellant and his two co-accused. Inspector Jacobs stated that the complainant, who is a minor, is not receiving any support from her mother who is also an accused in this matter. The mother ignored the complainant who reported the rapes to her, and she did not take any action.

[33] The Appellant’s contention is that he treated the complainant as his daughter and instilled discipline, which was not taken kindly by the complainant, and that the charges against him are driven by the complainant’s biological father and aunts. The Appellant further submitted that the complainant also went to town with her mother before the charges were laid against him, and asked for her mother to buy her pants, when her mother refused to do so, the complainant said her mother that she “will see”. In addition, the Appellant also contended that there are other rape charges laid by the complainant against other persons.

[34] 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 grounds listed in paragraphs (a) to (e)[32] of that section is/are established.

[35] The following grounds raised were established by the respondent in terms of the relevant subsections in section 60(4) above, and this court will take such factors into account, and they are as follows:

35.1 Section 60(5) (f) of the CPA, the court must consider the prevalence of a particular matter;

35.2 Section 60(6) (f), the nature and the gravity of the charge on which the accused is to be tried;

35.3. Section 60(6)(g), the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

35.4. Section 60(6)(h), the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

35.5. Section 60(7)(a), the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

35.6. Section (60)(7)(d), the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated

35.7. Section(60)(8A)(b), whether the shock or outrage of the community might lead to public disorder if the accused is released;

35.8. Section(60)(8A)(c), whether the safety of the accused might be jeopardized by his or her release;

35.9. Section(60)(8A)(e), whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system;

[36] Section 58 of the Sexual Offences Act provides that in proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of delay between the alleged commission of such offence and the reporting thereof.

[37] The submission regarding the period that elapsed before the complainant laid charges and the allegations that she has laid charges of rape against other persons is not a factor that indicates the alleged weakness of the case against the Appellant.

[38] Regarding the recording that will be relied on by the prosecution to prove the case against the Appellant, it is a matter that will be dealt with by the trial court. I cannot express a view on the admissibility or otherwise of the evidence of the recording. I am not persuaded that the Appellant succeeded in discharging the onus of proving existence of exceptional circumstances.

[39] I am of the view that the Magistrate who refused to grant bail was not wrong and therefore cannot interfere with the findings of the magistrate.

Order

[40] It is ordered that the appeal is dismissed.

B LESUFI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Appellant Adv Riaan Gissing instructed by ZAF Khan Attorneys For the Respondent Adv GJC Maritz Date of Hearing Date of Judgment

[1] 2002

(1) SACR 222 (SCA).

[2] 2010

(1) SACR 262 SCA 266.

[3] 1999

(4) SA 623 (CC).

[4] Id at para 64.

[5] Id at para 61.

[6] Mgumbi v S 2022

- [1] SACR 478 (WCC) (16 March 2022) at para 22.
- [7] 1998 (2) SACR 677 (SEC)
- [8] Id at para 678E-G.
- [9] See *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat* above at para 76.
- [10] 2003(2) SACR 575 (SCA).
- [11] Id at para 577.
- [12] 2010
- (1) SACR 55 (SCA)
- [13] Id at para 12
- [14] 1969
- (4) SA 175 (N)
- [15] Id 177 E-F.
- [16] 2010(1) SACR 262 (SCA)
- [17] Id at para 9.
- [18] *S v Ho* 1979
- (3) SA 734 (W) at 738H.
- [19] *R v Dhlumayo* 1945
- (2) SA 677 (A).
- [20] 1979
- (4) SA 218 (D).
- [21] Id at 220E-H.
- [22]
- [2006] ZASCA 3; 2006
- (1) SACR 603 (SCA) at 609I-J.
- [23] 2004
- (2) SACR 242 (C) at para [7].
- [24] Id at para 16.
- [25] *S v Mabena and Another* 2007 (1) SACR 482 (SCA) and *S v Van Wyk* 2005 (1) SACR 41 (SCA)

[26] See *S v Pienaar* 1992

(1) SACR 178 (W) at 180 H-J; *S v De Kock* 1995 (1) SACR 299 at 307 A-B, *S v Nichas and Another* 1977 (1) SA 257 (C) at 260E – 262H; *Moekazi and others v Additional Magistrate, Welkom and Another* 1990 (2) SACR 212 (O).

[27] See *S v Pienaar* above.

[28] 2002 (1) SACR 79 (CC).

[29] *Id* at 105DE -106A.

[30] See *S v Mathebula* above

[31] *Id* at 59DE.

[32] (a)Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other 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; or (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; or (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 circumstances there is the likelihood that the release of the accused will disturb the public order or undermine

the public peace or security;

[32] (a)Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other 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; or

(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; or

(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 circumstances there is the likelihood that the release of the accused will disturb the public order or undermine

the public peace or security;

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