

SOUTH AFRICA / JUDGMENT

Mahlangu v S (BA 04/2021) [2021] ZAMPMHC 3 (19 February 2021)

[2021] ZAMPMHC 3**COURT**

Middelburg High Court, Mpumalanga

BEFORE

H Brauckmann

CASE / FILE NUMBER

BA 04/2021

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Source record**IN THE HIGH COURT OF SOUTH
AFRICA****MPUMALANGA DIVISION,
MIDDELBURG (LOCAL SEAT)****Case No: BA 04/2021**

In the matter between:

SIMON PATRICK
MAHLANGU
Appellant
and
THE STATE
Respondent**JUDGMENT**

- [1] This is an appeal against the refusal of bail by the Court a quo in an application to be released on bail by the appellant in the Magistrate's Court for the district of Emalahleni.
- [2] On 23 January 2020 the respondent was arrested and charged with one count of contravening section 3 of the Sexual Offences and Related Matters Act, Act 32 of 2007, that he raped the complainant.
- [3] The appellant tendered evidence by handing up an affidavit of in support of his application. The respondent opposed the application, and the evidence of the investigating officer ("IO") was also tendered by way of an affidavit.

- [4] Both parties filed Heads of Argument before the appeal was heard and agreed to dispense with oral argument and that the appeal be dealt with on the papers before Court as provided for in the amended directives of the Judge President of this Court in so far as it relates to the Covid 19 pandemic. The Heads were very helpful and I wish to extend the Court's gratitude to both counsels in this regard.
- [5] Before the Court turns to deal with the appeal, it is important to mention that appellant's Heads of Argument contains new facts and evidence which were never disclosed to the Court a quo. This Court may also not have regard to the "evidence" now contained therein. This is an appeal and the appellant is bound by the four corners of the record and must argue thereon[1].
- [6] At the bail application the State advised the Court a quo that the Appellant faces a crime listed in Schedule 5 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("the CPA"). This is common cause.
- [7] Section 65
- (4) of the Criminal Procedure Act 51 of 1977 ("the CPA") provides that a Court hearing an appeal against the 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 to be followed is set out in *S v Barber* [2] :

"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 . . ."

- [8] This appeal turns on whether this the Court a quo exercised its discretion judiciously in the light of the applicable law and the facts that were before it.
- [9] The Respondent submits that section 60(11) (b) of Criminal Procedure Act, Act 51 of 1977 ("the CPA") stipulates that pertaining to schedule 5 offences:

"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 interest of justice permit his or her release."

- [10] The appellant raises the following grounds of appeal:

“1. The learned magistrate erred in finding that the Appellant has failed to discharge the onus resting on him on balance of probabilities that:

- 1.1. That he will not evade his trial;
- 1.2. That he will not interfere with witnesses
- 1.3. That he will not interfere with police investigations;
2. The learned Magistrate also erred in placing overemphasis on the strength of the state’s case;
3. The learned Magistrate misdirected herself in ignoring the provisions of Sec 60(9) in her judgment.
4. The learned Magistrate also erred in her finding that the Appellant has failed to prove on balance of probabilities that exceptional

circumstances exist to permit his release on bail.”

[11] In his affidavit in support of his application in the Court a quo, the appellant stated that he:

“...have no knowledge of the allegations levelled at me. I have witnesses who can corroborate the defence that I will adduce during the trial stage of this matter. I will deny all allegations levelled against me.”

[12] He further states that the complainant and he were involved in a romantic relationship for two months before the relationship turned sour due to various reasons, amongst other the complainant’s alleged ‘financial demands’.

[13] Only in his heads of argument does the appellant, through his Counsel, Adv RK Nkosi, introduce a defence of consensual intercourse that took place that same morning. He then goes further, testifies on behalf of his client (the appellant), and states that because he refused to concede to a claim for payment from the complainant later that day, she most probably laid the complaint. As stated earlier, these are new facts which the Court a quo did not have before it.

[14] In the face of the bald denial by the applicant in his affidavit, the Court a quo cannot be criticised in coming to the conclusion that there is a strong case against appellant. It seems as if the appellant made use of the same counsel in the bail application and this appeal. I am of the view that appellant is attempting to “slip” evidence into a proceeding that is not proper. Be it as it may, that appellant had the opportunity to disclose this defence to the Court a quo, but elected not to do so.

In *S v Mathebula*[3] the Honourable Justice Heher held as follows:

“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 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”

- [15] The crime allegedly committed is very serious and prevalent in our society. The complainant is a young (pregnant) girl. I am of the view that the strength and seriousness of the case was correctly taken into account by the Court a quo, and I cannot agree with appellant on that ground.
- [16] The Investigating Officer testified that the investigations have been finalised. The only outstanding item was the results of the DNA samples taken. The appellant therefore will not be able to interfere with the investigation. It is however not where it ends. It was common cause (as the evidence by the IO was not denied by appellant or his Counsel in the Court a quo) that appellant sent people to attempt to contact the complainant. It is significant to note what his counsel states in his Heads before this Court, although it is irrelevant for the reasons stated earlier[4]. The Court a quo’s inference that appellant sent these people to the complainant, and that, should he be released on bail, he could go there in person, was not only reasonable, but the only inference it could draw under the circumstances.
- [17] In argument before the Court a quo, Advocate Nkosi stated that old people went to complainant’s home to “mediate” I agree with the Court a quo that on the appellant’s own version then (and the ‘new’ version in his Counsel’s heads, there was absolutely nothing to mediate. It seems as if the appellant will likely attempt to influence or intimidate witnesses. For that reason alone I cannot fault the Court a quo in its conclusion that it will not be in the interest of justice to release appellant on bail.
- [18] The question that remained for the Court a quo to answer was whether the appellant will evade his trial. The undisputed evidence before the Court a quo by the IO was that the appellant moved to a different address as soon as he realised that he has problems concerning this matter. He did not even notify his Landlord of his intention to vacate the room he used to occupy. It appears that the appellant moved again to a further address and eventually to his parent’s address where he was arrested approximately three months after the alleged rape. The appellant left his place of employment after he moved around and is unemployed. The Court a quo’s conclusion that he attempted to evade arrest is more than reasonable. The question begs; why would he, being faced with these serious allegations, not yet again flee to escape being tried. the possible lengthy term of imprisonment is a very relevant factor for courts hearing bail applications, to consider regarding the likelihood the applicant might evade his trial.[5]
- [19] There is in the Court’s view no fault to be found with the Court a quo’s findings. The release of the appellant on bail will indeed not be in the interest of justice.

THE FOLLOWING ORDER IS THEREFORE MADE:

1. The appeal is dismissed.

SIGNED AT PRETORIA ON THIS THE 19th DAY OF FEBRUARY 2021.

H Brauckmann

ACTING JUDGE OF THE MPUMALANGA DIVISION,

MIDDELBURG (LOCAL SEAT)

Counsel for the Appellant: Adv R K Nkosi – rknkosi.inc@gmail.com

Counsel for the Second Respondent: Adv D Rowles - drowles@npa.gov.za

[1] Dhlamini v Mayne (1916) 37 NLR 173.

[2] 1979 (4) SA 218 (D) at 220 E-G; See also S v Branco 2002 (1) SACR 531 (WLD) at 533 I.

[3] 2010 (1) SACR 55 (SCA).

[4] Para 31 of Appellant's heads: "It is also the accused's submission that soon after the arrest of the Appellant, his parents took it upon themselves to enquire from the complainant as to what had happened. I submit that the accused had no knowledge of the initiative taken by a member of his family. I submit that the court should not have imputed the act to him as he had no knowledge thereof."

[5] S v Van Wyk 2005 (1) SACR 51 (SCA) page 46: "Gegewe die sterk prima facie-saak van die Staat, die langtermyn gevangenisstraf wat sal volg op 'n moontlike skuldigbevinding en die infrastruktuur waarna ek verwys het, is ek van oordeel dat daar 'n redelike vooruitsig is dat as hy op borg vrygelaat sou word, hy een of ander tyd sy verhoor mag ontwyk."

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