

SOUTH AFRICA / JUDGMENT

M.K and Another v S (A312/2022)

[2025] ZAGPPHC 439 (8 May 2025)

[2025] ZAGPPHC 439**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

A312/2022

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Policy**FLYNOTES:****CRIMINAL**

– Bail – Pending

appeal reconsideration at SCA –

Two

brothers convicted of rape of minor – High Court appeal

dismissed – Special leave to appeal at SCA dismissed

–

Reconsideration by President of SCA pending – Applicants not

defaulting on bail conditions for four years but

now in custody –

Overcrowding and conditions in prisons discussed – Having

tasted prison life, this will not

encourage applicants to return

to prison if appeal attempt unsuccessful – Failed to show

existence of exceptional circumstances

– Application refused

– Criminal Procedure Act 51 of 1977, s 60(11)(a).

REPUBLIC**OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA**

Case
Number: A312/2022
(1)
REPORTABLE: YES / NO
(2)
OF INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED: YES

DATE: 08/05/2025
SIGNATURE
In

the matter between: M[...]
K[...]
FIRST APPLICANT
M[...]
K[...]
SECOND APPLICANT
v
THE
STATE
RESPONDENT

JUDGMENT

MOSOPA J

INTRODUCTION

- [1] This is an application for the applicants to be permitted to bail pending an application of a reconsideration to the President of the Supreme Court of Appeal, in terms of the provisions of section 17(2)(f) of Act 10 of 2013 read with the provisions of section 316(3)(a) of Act 51 of 1977, brought on an urgent basis in terms of Rule 6(12) of the Uniform Rules of court.
- [2] Ordinarily, bail applications are urgent matters which need to be considered on an urgent basis. It is for that reason that a determination is made that the matter is urgent. The bail application is opposed by the respondent.

BACKGROUND

- [3] The applicants were convicted in the Regional court for the Regional Division of Gauteng, Pretoria on the following charges;

3.1. First applicant

- (a) Rape, and
(b) Sexual assault

3.2. Second applicant

(a) Rape

All the charges relate to the same complainant who was still a minor at the time of their commission. The applicants were sentenced to 20 years imprisonment as a sequel to their convictions.

[4] The matter served before Tshombe AJ and Mosopa J, as an appeal against convictions and on the 30 October 2024 and the appeal against their convictions was dismissed. It was further ordered that the applicants must surrender themselves within 7 days of the order to start serving their sentences.

[5] Applicants aggrieved by the appeal outcome further appealed to the Supreme Court of Appeal (“SCA”) and on the 22 November 2024, Mosopa J, made an order extending the bail of the applicants with ancillary conditions pending the outcome of their appeal to the SCA. The applicants special leave to the SCA was dismissed on the 19 March 2025.

[6] Aggrieved by such outcome, the applicants filed an application for the reconsideration of such decision to the President of the SCA in terms of the provisions of section 17(2)(f) of Act 10 of 2013 and such decision is still pending. After the decision of the

SCA, dismissing the special leave to appeal application was handed down, the applicants handed themselves in to start serving their

sentences at the Kgosi Mampuru II Correctional Centre, in Pretoria. Application for reconsideration of the SCA decision is still pending.

PERSONAL CIRCUMSTANCES OF THE APPLICANTS

[7] Both the applicants are twin brothers who are 50 years old. They are South African citizens and both do not have valid South African passports, nor do they intend to apply for such if released on bail. They do not have friends or family members outside of the borders of the Republic.

[8] The first applicant is residing at [...] J[...] Street, Vanderbijlpark, SE3 and the second applicant resides at 1[...] W[...] R[...], Bergtuin, Pretoria. The first applicant has been residing at that address since 2022, meaning that he started residing there after the commission of the offence he has been convicted of. It is not clear as to whose property it is as the applicant is unemployed.

[9] The first applicant is not married but has one dependent, a daughter aged 10 years and is currently residing with her mother in Benoni. The second applicant is married out of community of property and two daughters, namely M[...], 17 years old and L[...] 13 years old, were born out of that marriage. They are both attending school and are staying with both the second applicant and his wife.

- [10] The first applicant is currently unemployed, and second applicant is employed as an internal salesperson at Bearing Agent earning a net salary of R35 000, 00 and has been in such employment for the past 23 years. It is not clear as to whether his employer will be willing to accept him back to his employment when released on bail.
- [11] They both have no previous convictions except for the current convictions and no other pending cases against them. They have not defaulted on their bail conditions set for their release, since during their trial matter up until their appeal outcomes and even after learning of their unsuccessful appeal to the Supreme Court of Appeal.
- [12] They do not have the intentions to endanger the safety of the public and also they do not have any contact with the complainant or her family. They guarantee not to commit schedule 1 offences whilst out on bail. They harbour no resentment towards the court's judgment and the sentence meted upon them.
- [13] The second applicant is responsible for the maintenance of his children. They promise to adhere to any bail conditions set for their release. The interests of justice, considerations of prejudice and the balancing of respective interests favour their release on bail.

DISCUSSION

- [14] The offences which the applicants have been convicted and sentenced for, still resorts under Schedule 6. Section 60(11)(a) of Act 51 of 1977, makes the following provision;

"60(11)(a) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

- (a) 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."

- [15] Section 321(1)(b) of Act 51 of 1977 makes the following provision,

"321

- (1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless-
- (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided."
- [16] In essence, section 321 provides that an appeal against conviction does not automatically suspend the execution of the sentence imposed following the conviction. The above also enjoins the court to consider the bail application of the convicted person, if court think fit to order the release of such person. However, what is important in addition to other factors the

court may consider in releasing the convicted person on bail is to consider whether that person is a flight risk especially when he knows that he is convicted and sentenced and also facing the prospect of a long prison stay.

- [17] The wording of section 60(11)(a) may suggest that, is only applicable to accused who are not convicted but in essence it is applicable to bail applicants who are convicted and sentenced pending the finalisation of their appeal matters. The above is confirmed in the matter of *S v Bruintjies* 2003 (2) SACR 575 (SCA) at paragraph 6, when Shongwe AJA (as he was then) observed that,

“[6] The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself constituted an exceptional circumstance within the meaning of the section. If that were so, however, the great majority of persons facing charges involving

Schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations, such as, for example, the public safety. The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. 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. The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters, together with all other negative factors, will be cast into the scale with factors favourable to the accused, such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.”

- [18] The fact that the applicants have been convicted and sentenced, their appeal was unsuccessful in the High Court and their special leave to the SCA was dismissed, is a clear indication that the circumstances of the applicants had changed and they need to place new facts, which must be deemed to be exceptional circumstances, before this court can release them on bail. (see *S v Yanta* 2000 (1) SACR 237 (TK)).

- [19] The onus is on the applicants on the balance of probabilities to show that they meet the requirements set by section 60(11)(a) and 60(4)(a)-(e) of Act 51 of 1977. Most importantly the court considering a bail application is enjoined by section 60(10) to weigh up the personal interests of the bail applicant against the interests of the justice. The interests of justice should be interpreted to include the safety of a person against whom the offence in question has allegedly been committed.
- [20] The complainant was violated by the applicants when she was very young and was a friend of the second applicant's child. She viewed the applicants as her parents as she enjoyed being in the company of the second applicant more than with her own parents. At that stage, even though the first applicant was not residing there, he used to visit there often and is also known to the complainant. She shared deep "secrets" with the wife of the second applicant, and this shows exactly how close the complainant was to the applicants, more especially to the second applicant. She would alternate going to spend a weekend at the second applicant's place of residence, though with the approval of her parents as they used to be their neighbour before she relocated to a new address.
- [21] One must bear in mind that it has now been approximately 4 years since the applicants have been convicted and sentenced, the commission of the offences was in 2018. Despite the fact that applicant avers in their affidavits that they do not harbour any resentment against the complainant, the sentence has a serious effect and/or impact in their daily lives, without the applicants expressing that, it had a negative impact on the marriage of the second applicant. Their standing in the community has changed, even if it is not born out of the record, but it is common sense.
- [22] It is for the above reasons that the safety of the complainant ought to be guaranteed.
- [23] Ms Cronje on behalf of the respondent contended that the applicant since they handed themselves to start serving sentence, they have tasted prison life and as such this can encourage them to abscond in the event their applications to petition the President of their SCA is not successful and they are therefore a flight risk. It is plain that the applicants have not been in prison since their arrest as they were granted bail after their arrest. This was the position until they recently handed themselves over to start serving their sentences.
- [24] It is also common that the prison conditions in South African prisons are not pleasant. There is an issue of overcrowding and related ills that are prevalent in our prisons. Having tasted this kind of prison life, this will not encourage the applicants to return to prison if their applications in terms of section 17(2)(f) is not successful. I fully agree with the contention by Ms Cronje.

- [25] The first applicant is not employed and is not a primary caregiver to his child. The child is currently in the care of her mother in Benoni, who is also responsible for her maintenance looking at the fact that the first applicant does not have any financial income. The second applicant is gainfully employed and responsible for the maintenance of his children. It is not the second applicant's contention that he is a sole breadwinner in his family.
- [26] Nothing much is said with regards to the wife of the second applicant, whether she is employed or not and her part of contribution towards the maintenance of the second applicant's children.
- [27] As stated in Bruintjies (supra), the reasonable prospects of success in the appeal does not constitute exceptional circumstances as intended by section 60(11)(a), but that aspect must be considered together with other relevant factors. The approach adopted by the applicant in not addressing this court on the reasonable prospects of success and merits in more detail is applaudable considering the fact that I do not consider the applicant succeeding in his further appeal to the SCA.
- [28] The fact that, for a period of 4 years the applicants never defaulted on their bail conditions is considered, but it cannot be used as a factor that can lean towards the applicants being released on bail at this stage. They never committed any schedule 1 offences whilst out on bail, but this again cannot be used to grant the applicants' bail. It is for these reasons that bail applications should be refused. It is to be noted that the applicants have been convicted of very serious offences, which entail violating the privacy of the complainant, and the prospects of facing lengthy sentences if their applications to the SCA do not succeed is real. The applicants failed to show the existence of exceptional circumstances that can permit them to be released on bail. It is for this reason that the bail applications cannot succeed.

ORDER

[29] In the result the following order is made;

1. Application for the release of the applicants on bail pending the finalisation of the application for a consideration to the President of the Supreme Court of Appeal, in terms of section 17(2)(f) of Act 10 of 2013, is hereby refused.

M.J. MOSOPA

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES

FOR THE APPLICANTS : ADVOCATE JANSE VAN RENSBURG INSTRUCTED BY

: HAMAN AND BOTHA ATTORNEYS FOR THE RESPONDENT : ADVOCATE CRONJE INSTRUCTED BY

: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA

Date of hearing: 09 April 2025

Date of judgment: 08 May 2025

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