IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: CA&R 45/2021

In the matter between:

APOSTILE LONWABO TEDE **First Appellant**

VUYOLWETHU NAMBA **Second Appellant**

and

THE STATE **Respondent**

BAIL APPEAL JUDGMENT

STRETCH J:

[1] The appellants have been charged with 15 counts involving the schedule 6 offences of rape and trafficking in persons for exploitation and sexual purposes. It is alleged that these offences took place over a period of some 16 years.

[2] The appellants were arrested on 13 November 2021. On 25 November 2021 they brought a joint substantive bail application on

affidavit, which was opposed by way of affidavit and oral evidence on oath. On 30 November 2021, the Zwelitsha magistrate (in a 20- page fully reasoned judgment), refused bail. At the time that bail was refused, the State had sourced affidavits from at least seven female complainants (between the ages of 16 and 22), and two males who were aged 18 and 19 at the time of the alleged commission of the offences.

[3] The appellants are appealing this judgment, averring in a nutshell that the magistrate erred in finding that:

a. mere undertakings to refrain from performing certain acts if released on bail were insufficient;
b. the first appellant posed a threat to the witnesses, and there existed a likelihood that he could influence or harm them, because he had said this much to warrant officer Ndebele who had escorted him to his first court appearance;
c. there was a likelihood that the second appellant would evade her trial; and also,
d. that the magistrate had erred in condoning arrests first and investigations later.

[4] The offences with which the appellants have been charged fall within the ambit of schedule 6. This means that any bail application must be approached in terms of s 60(11) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The sub-section makes it peremptory for the court to order the continued detention of the accused until dealt with according to law, unless the accused adduces evidence which satisfies the court that exceptional circumstances exist, which, in the interests of justice, permit his or her release. In a nutshell, the default position for the schedule 6

accused is no bail. Differently put, and as succinctly stated in *S v Schietekat* 1999 2 SACR 51 CC, the evaluation of such cases has the predetermined starting point that detention is the norm. Paragraph 64 of that judgment reads as follows:

> 'Section 60(11) contemplates an exercise in 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 the "exceptional circumstances" are shown by the accused to exist. The exercise is one which departs from the constitutional standard set by section 35(1)(f) of the Constitution. 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 "interests of justice" were to be applied.'

[5] The exceptional circumstances must not be those which are found in an ordinary bail application. They should pertain peculiarly to an accused person's specific application (see *S v Petersen* 2008 2 SACR 355 C). Differently put, personal circumstances which are essentially commonplace, cannot constitute exceptional circumstances for purposes of the section (see *S v Scott-Crossley* 2007 2 SACR 470 SCA). Examples which immediately come to mind where courts have, in the frames of reference of particular sets of facts, accepted circumstances to have been exceptional, are the urgent necessity for serious medical intervention, or the existence of a cast-iron alibi strongly supportive of the accused's innocence. In *S v Mabena* 2007 All SA 137 SCA, Nugent JA however stated that graver offences listed in schedules 5 and 6 are naturally subject to a regime which is even more stringent than would otherwise be.

[6] I must now apply these entrenched principles to the matter before me, taking into account that s 65(4) of the CPA dictates in peremptory language that I shall not set aside the decision against which the appeal is brought, unless I am satisfied that the decision itself (and not necessarily the *ratio* underlying the decision) was wrong, in which case I am at liberty to substitute the decision. I have given thorough consideration to the magistrate's judgment and the criticisms levelled against it. The magistrate, to my mind, delivered a particularly detailed and careful judgment. Indeed, if any errors were committed, they tended to be in favour of the appellants. By way of example, I am of the view that the magistrate was generous in concluding that the point of departure in a bail application where the onus is on the accused to show the existence of exceptional circumstances justifying his release, still has at the heart of it, the interests of justice test. I say this, because it is evident that the Constitutional Court in *Schietekat* dealt with that particular s 60(11) applicant in a far harsher manner.

[7] The main criticism of the magistrate's judgment, *viz,* his finding that the mere undertakings of the accused on paper to refrain from conduct prohibited by their bail conditions, was insufficient to discharge the onus which they bore, seeks to rely to my mind, on a misinterpretation of what the judgment essentially seeks to convey. I say this because it goes without saying that the interests of justice (in an ordinary bail application in terms of s 60(4)) automatically do not permit the release of an accused where one or more of the following is affected:

a. public safety;
b. whether the accused will stand trial;

c. the safety and availability of current and potential state witnesses and other evidentiary material;
d. the proper functioning of the justice system; and
e. the protection of public order, peace and security.

[8] In my view the magistrate correctly identified the crisp issues in this matter, at paragraph 10 of his judgment, where he commented as follows:

> 'The State's, and in fact this Court's main concerns after considering the evidence before me, lies in the safety of the state witnesses, potential witnesses and the public, as well as in the likelihood that the applicants will not stand trial.'

[9] The magistrate concluded that when the onus lies with the accused, the correct way to discharge it is to provide facts or factors which would lead the court to arrive independently at a sought after conclusion. There is nothing wrong with this reasoning. The magistrate thereafter quite properly made reference to the first appellant's stated defence, being that all these complaints are fabrications sprouting from a very recent vendetta against his church, held by a group of persons who had broken away from his congregation, and which group had made its best endeavours to influence persons to invent false information about him. To my mind, having due regard to where the onus lies, such a bald statement is wholly insufficient for the discharge thereof. If the appellants wanted the magistrate to attach some weight to this defence, they were surely empowered by direct and indirect means and evidence at their fingertips to provide at least a modicum of support for these contentions. Yet they elected not to do so. Nor did they make themselves available to be questioned about this alleged recent vendetta.

[10] As for the second appellant, she unfortunately elected simply to piggy-back on the first appellant's case, without even touching on the onus which she bore to provide credible information as to her assets, a fixed place of address, family ties and so forth. Indeed, she hardly produced anything at all on which the magistrate could safely rely to distinguish her from the first appellant.

[11] On these two crucial aspects I am inclined to agree with what is stated in the respondent's heads of argument. In dealing with the ground relating to interference with state witnesses, the court held that both the appellants are familiar with the witnesses and that the first appellant made threats in the presence of a police officer. In my view the magistrate was quite justified in expressing concern about what the police officer had said in his affidavit, as opposed to the sketchy contents of the first appellant's affidavit, particularly in the context of serious complaints made on oath by several soft, gullible and vulnerable targets. On this particular aspect the officer's affidavit reads as follows:

> '...Lonwabo Tede informed me without being asked that he knows the people who are after/behind his arrest. He even know why they want him behind bars and he will deal with them as soon as he gets bail because they are playing with fire. They do not know who they are dealing with and also, they do not know what he is capable of.'

[12] This evidence does not stand alone. It is corroborated to some extent by the anger and hostility openly expressed by the first appellant in his affidavits in support of the bail application. Furthermore, the magistrate was clearly (and correctly so) alive to the common cause fact that the first appellant is a particularly powerful and influential figure. He is both an employer and a spiritual leader in a compound of which the complainants

formed a part. It is also not in dispute that the second appellant is but one of his devoted disciples who found herself indebted to the first appellant for having taken her under his wing when she had nowhere else to go.

[13] To sum up, it is my view that neither of the appellants have touched on discharging the onus that exceptional circumstances exist, which would elevate their position to one which would comfortably fit into "liberty in the interests of justice" category. It has been contended on behalf of the first appellant that exceptional circumstances exist in the possibility that his fixed property may be vandalised while he is being detained, and that the detention may well be lengthy because DNA testing takes time.

[14] In my view there is no substance in these submissions, and they amount to speculation. There is in any event no evidence that the compound has not or will not be cared for in the first appellant's absence. On the contrary, it appears that he has strong support from his spouse and his employees.

[15] The appellants in argument, have referred to the judgment of Rabie J in the Gauteng division of the high court in *S v Fourie* (Pretoria case no. A107/2020) handed down on 8 June 2020. In that matter the court dealt at length with the interpretation of exceptional circumstances and referred extensively to relevant case law, in support of a finding that exceptional circumstances existed. I have read the case thoroughly. I am satisfied that the facts in that case are such that it serves to be distinguished from the matter before me. For one, the magistrate whose decision to decline bail was overturned on appeal in *Fourie,* had been presented with several affidavits, by and large supporting the appellant's case, instead of making out a strong case against him. Indeed, an affidavit deposed to by one 'De

Koker' turned out to have shown that the State's case was not particularly strong at all. This is not so in the matter before me, where the magistrate who declined bail was referred to at least nine affidavits relying on the same *modus operandi* in support of no less than 15 charges of rape and trafficking in persons for exploitation and sexual purposes.

[16] The magistrate in the court *a quo*, who is regularly steeped in the atmosphere of applications of this nature and the turnaround time of the court, was of the view that it was likely that the case would be dealt with before the expiration of a year. It goes without saying that accused persons who generally find themselves in intolerable circumstances where the commencement and the finalisation of their trials are nevertheless being unduly protracted, are not barred from seeking fresh forms of redress, if so advised.

[17] I am accordingly not satisfied that the magistrate wrongly exercised his discretion, and that the decision to refuse bail was wrong. In the result the appeals cannot succeed. I make the following order:

The appeals of both appellants are dismissed.

PP. _____

I.T. STRETCH
JUDGE OF THE HIGH COURT, BHISHO

Date heard: *24 December 2021*

Judgment delivered: *24 December 2021*

Counsel for the appellants: *Mr Z.M. Maseti*

Instructed by: *Ronny Lesele Attorneys, King William's Town*

Counsel for the State: *Mr N Ntelwa*

National Prosecution Authority, Bhisho