REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/05/2017
DATE _____ SIGNATURE

CASE NO: **A130/2017**

In the matter between:

GUMBO FANUEL Applicant

and

The State Respondent

JUDGMENT

MATSHITSE AJ

[1] This is an appeal against the refusal by the Regional Magistrate Kempton Park from granting Applicant bail wherein he is charged with the offence of raping a minor child of three years old.

[2] The Applicant was arrested on the 14th of February 2017 and his bail hearing was heard on the 24 February 2017 wherein it was refused.

[3] The Applicant now appeals against the refusal of bail pending his trial

[4] Applicant brought his application for formal bail application by means of an affidavit with supporting affidavits from, Bongani Gumbo, with annexures attached thereto and Sunnyboy Gumbo, his brothers. The State in opposing the application they called the Investigating Officer Nalebotse Mende Mamohale to testify.

[5] The question is whether the applicant, having been given a reasonable opportunity to do so, adduced evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release

[6] In short the facts of the Applicant's case are:

6.1. He is 32 years old, born in Plumtree Zimbabwe, he entered into a traditional marriage with one Medisa Gomo in 2008 out of which 2 boys, where born age 10 and 3 respectively.

6.2. Together with his family they have been residing with his brother Bongani Gumbo and his wife, for the past 6 years, at number […] C. Avenue Eastley Edenvale.

6.3. He is self-employed transporting children to school and crèche and also he is cleaning and renovating swimming pools for other people and he earns about R8 000.00 per month. His wife is doing odd jobs at restaurants and per month she is earning about R2 500.00. The 10 year old child is attending school while the three 3 is still attending at crèche.

6.4. The facts that led to his arrest is that on day the 13th February 2017, in the morning, he collected the victim from her home at Thornhill and transported her at Kempton Park. Later on in the afternoon at around 16h30 he picked her up from her crèche. The normal route was for him to go and drop her at her home.

6.5. On that day, he did not take her straight home, he went via Thembisa, as he wanted to view a motor vehicle which was allegedly being advertised for sale on Gumtree. He took one of his brothers along being Sunnyboy Gumbo to accompany him there.

6.6. By the time he went to Thembisa he was in the company of his brother and the alleged victim. They returned late from Thembisa and he dropped the child at her home of which he apologised to the child's grandmother. They then left

6.7. The following day he received a whatsup message from the

child's grandmother to the effect that he should not come and take the child to crèche. Later he received call from the child's crèche informing him that a case of child molestation has been opened against him at Sebenza police station. He proceeded to the said police station and he was informed that there was no such case that has been opened against him

6.8. He proceeded to the victim's house to also inquire, that is when the police were called and he was interviewed as to why he brought the child back home late, of which he explained but at the end he was arrested.

6.9. He denied committing the alleged offence. DNA samples have been obtained from him. He referred the court to the provisions of section 60(4) (a)-(e) of the Criminal Procedure Act 51 of 1977. He is holder of a valid Zimbabwean passport with a valid work permit.

6.10. He can afford bail in the amount R5000.00 and will comply with any conditions which the court may impose upon him.

6.11. His two brothers Bongani and Sunnyboy Gumbo also filed their supporting affidavits confirming what applicant had stated in his affidavit.

[7] The facts of the State case in short, through the testimony of the Investigation Officer are :

7.1. The grandmother of the child had told him that after the applicant had brought the child back home at around 19h45, just before they went to bed, she played with the child.

7.2. The child then told her that she is feeling pains on her private part (vagina), she then inspected her, saw something that she did not understand, she found that the child was slightly injured some sort of swelling. She then took her to Sunninghill hospital. The doctor then completed J88 and observed that the child had bruises in the vagina and the vagina was swollen, there were abrasions found on labia majora and posterior fourchette and the hymen was externally swollen and bruised.

7.3. The doctor took some DNA samples, crime kit, which was handed over to the Police Officer, Sgt Mokolwa, thereafter same was delivered to Forensic Science Laboratories at Pretoria on the 20 February 2017.

7.4. The Applicant only give him his passport number and not the actual passport.

7.5. He went to the residential address of the applicant, met a certain lady, who refused to give him his particulars, that lady informed him that applicant is residing there but they are renting in that place.

7.6. He is opposing Applicant being granted bail because:

6.6.1 the family of applicant has send a message to the minor child's grandmother to the effect that she will raise the child while is in her grave. (Contravention of Section 60(4)(c))

6.6.2 the issue of passport, applicant only give him the number of the passport, applicant is only renting where he is residing, as a result he can vacate the said place at any time or when he feels like it or when he wants to leave. (Contravention of Section 60(4)(b))

[8] In considering the application for bail, the learned Magistrate made the following pertinent findings that impacted on his ruling in this matter:

8.1. He found that the doctor, who is an expert in the field of medicine, completed the J88, which was presented as evidence, that there are injuries on the vagina, on the labia majora, posterior fourchette. Whether the vagina was injured as a result of penal

penetration or any other object, he cannot at this stage say but it is clear that something was pushed into her vagina.

8.2. What or who injured the child, there are no eyewitnesses, even though there is no eyewitness, because one cannot expect an eyewitness, in these types of offences, which usually happens in greater privacy of secrecy, the law accept the circumstantial evidence. All the other witnesses who comes, and testify, they are not real eyewitnesses.

8.3. He came to the conclusion that at this stage circumstantial evidence shows that the applicant was the person in whose custody the child was and should be able know what actually happened to it (the child)

8.4. He found that even though the investigations are incomplete, it was the duty of the applicant to have returned the child in a safe condition and further there were no exceptional circumstances in the case, as a result accused application to be released on bail was refused.

[9] The grounds of appeal by the Applicant which are attached to his Notice of appeal against the Refusal of bail dated the 11th April 201, among others it stated that:

9.1. The learned Magistrate erred in his conclusion that there are no exceptional circumstances which in the interest of justice permitted the Applicant to be released on bail

9.2. There is no direct evidence implicating accused, as a result the respondent is relying on the circumstantial evidence to oppose the bail.

9.3. The State case is weak based on the fact that DNA results are still outstanding and the Magistrate misdirected himself and was wrong when he said there is a strong prima facie evidence against the Applicant without DNA results.

9.4. J88 submitted by the Respondent is silent about the alleged offence. No injuries sustained by the victim or suggest otherwise. The victim's parents suspects that she was sexually assaulted.

[10] The usual grounds normally raised denying the release of an accused person on bail are provided in the provisions section 60(4) of the Criminal Proceeding Act 51 of 1977 (hereinafter referred to as "the Act") which provides as follows:.

[11] "(4) The interest of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule I offence; or

(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 jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) Where accused will disturb the public order or undermine the public peace or security;

[12] It was common cause during the bail proceedings in the court a quo that the appellant was charged with Schedule 6 offence. Section 60(l1)(a) of the Act which provides that notwithstanding any provision of the Act where an accused is charged with an offence referred to in Schedule 6, the court shall order the accused to 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 interest of justice permit his or her release.

[13] It is trite that this court has no authority to interfere with the discretion of the court a quo unless if the court a quo has erred or misdirected itself as clearly stipulated in s 65 (4) of the Act that provides that: “The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[14] The question before me is therefore whether the court a quo erred in finding that the applicant did not succeed in showing that there were exceptional circumstances entitling him to be released on bail and further by so doing he exercised his discretion wrongly.

[15] An applicant in a bail application is given a broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant (accused) or anything else that is particularly cogent. (See S v Dlamini; S v Dladla & Others; S v Joubert, S v Schiet... 1999(2) SACR 51 (CC) in particular paragraphs [75] and [76] thereof.) Personal circumstances present to an exceptional degree, may lead to a finding that release on bail is justified. (See S v Rudolph 2010(1) SACR 262 (SCA).)

[16] In the context of section 60(1 l)(a). The exceptionality of the circumstances must be such as to persuade a court that it would be in the interest of justice

to order the release of the person of the accused. A certain measure of flexibility in the judicial approach to the question is required**.** (See S v Mohammed 1999(2) SACR 507 (C) at 513F-515F.)

[17] It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To incarcerate an innocent person for an offence which he did not commit could also be viewed as exceptional. It could not have been the intention of the legislature in section 60(4)(a)-(e) of the Act. to legitimise at random the incarceration of persons who are suspected of having committed Schedule 6 offences, who after all must be regarded as innocent until proven guilty in a court of law. (See S v Jonas 1998(2) SACR 673 (SEC).)

[18] Snyders JA in *S v Rudoplh* 2010 SACR 262 (SCA) at page 266e paragraph 8 and 9 wrote the following: *"[8] … Section 60(11)(a) of the Act prescribes that in the case of offences falling within the ambit of Schedule 6 that –'… 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'. [9] The section places an onus on the applicant to produce proof, on a balance of probabilities, that 'exceptional circumstances exist which in the interests of justice permits his release. It 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 'exceptional circumstances' are shown by the accused do exist. Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified."

[19] The court a quo, in refusing bail to the Appellant, stated that respondent has a strong prima facie case which is based on circumstantial evidence against the applicant. since the child was injured and the last person that the child was with, was the applicant, and as a result he should explain where does the injuries that were found on the child comes from

[20] Prima facie evidence is subject to be tested during trial. The impact of such prima facie evidence in a bail application should be seen to be minimised by lack of evidence of the likelihood that if released on bail, the accused will attempt to influence or intimidate witnesses or to attempt or destroy evidence. Or contravene any of the provisions of section 60(4) of the Act. No such a suggestion against the appellant was made. The likelihood of the appellant evading trial other than to suggest a strong case, was not established. Also from the reading of the Learned Magistrate judgement he only dealt, concentrated on, the strength of the state case but left out other issues.

[21] In this matter the victim is a 3 year child, and as correctly pointed out by

the Learned Magistrate, there is no eye witness. The state would be bound to rely on circumstantial evidence based on expert witnesses regarding professional or medically physical or psychological examinations of the victim. The State alleges that DNA has been taken (obtained) from the victim but according to J88 there is no serial number on it, doctor has indicated not applicable (n/a), therefore the question is which DNA result is being awaited for. However counsel for the Respondent, during his argument in court, has indicated that that was an error, there is serial number, but it was omitted by mistake from writing it on the J88 form. This may not be an easy mountain to climb, where the state has to prove its case beyond reasonable doubt

[22] In the matter of S *v DV* 2012 (2) SACR, the court held that: “The court a quo had proceeded from a wrong premise, which made it concentrate only on the seriousness of the offence without dealing with the case whether, if released on bail, the Appellants would interfere or intimidate state witnesses, or whether their personal circumstances were such that they would not stand trial."

[23] Subsection (9) provides that in considering the question in subsection (4), the court shall decide the matter weighing the interests of justice against the right of the accused to his or her freedom and in particular, the prejudice he or she is likely to suffer if he or she were to be detained in custody taking into account where applicable the following factors:

"(a) the period for which the accused has already been in custody since or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defense or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into account.

[24] To suggest that any of these factors do not have to be taken into account, where an applicant in a bail application under Schedule 6, faces a hurdle to establish the existence of exceptional circumstances, in my view, would amount to summarily refusal to release an applicant under section 60.

[25] It is therefore important to note that neither personal circumstances nor any of the factors in s 60 (4), more particularly in this matters s 60 (4) (b) and (c) reasons why the investigating officer was opposing bail, can be considered in isolation but are together of equal importance when deciding on the interest of justice. The court is as well required in exercising its discretion, to balance the interest of justice and the constitutional right of the Applicant to liberty in that way. The likelihood of the applicant absconding.

[26] If there is no risk of an applicant absconding if bail is to be granted, a court should lean in favour granting bail. See *S v Anderson* 1991 (1) SACR 525 (C) at 527 B-G; *S v Hudson* 1996 (1) SACR 431 (W) at 434 A-D; *Bailey and Others v The State* [2013] ZAKZPHC 72 at paragraph 29.

[27] Among the grounds of appeal against refusal of bail applicant has submitted that the presumption of innocence operates in favour of the Applicant even when there is a prima facie case against him.

[28] The applicant's right to be presumed innocent is not a bail right but a trial right as was plainly pointed out in S *v Dlamini* 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771). Fittingly, the duty of the court in a bail application is to *prima facie* determine the relative strength of the state case against the bail applicant as opposed to making a provisional finding of guilt or innocence of such an applicant.

[29] The learned Magistrate, during the delivery of his judgement it seemed he made provisional finding of the guilt of the applicant at page 48 of the record “I have tried many cases of rape. I have never seen a case where an accused person will rape somebody where there would be witnesses.

[30] He went on further “Whether it is penal penetration or any other object, it will remain rape, because so far our definition of rape has been widened as a result of the coming into effect of the Sexual offences act 32 of 2007

[31] He did not attach any wait to applicants brothers affidavit, he dismissed same by saying that “maybe the fact that the brother of the accused also filed an affidavit, well, cannot expect the brother of the accused to make a statement which will expose the accused”

[32] Therefore the learned magistrate could not dealt with the innocence or guilt of the Applicant but only with a fact whether or not the Respondent has established a prima facie case against the Applicant that makes his continued incarceration to be in the interest of justice. A determination that is to be made in consideration with other various factors that has been highlighted by s 60 (4), the injuries as stated in J88 and all the other factors that revealed a strong case against the Applicant plus the possibility that he might influence or interfere with the witnesses, flight risk, and the seriousness of the offence. S *v Van Wyk* 2005 (1) SACR 41 (SCA).

[33] The Learned Magistrate did not make any funding with the risk of the Applicant absconding. The appellant was arrested on the 14th February 2017. Prior to his arrest, according to his affidavit, which has not been disputed, he received an message from the grandmother of the victim saying he should not come and collect the child to crèche, he then inquired from the crèche what is problem, of which he was informed that the family of the victim has laid charges of child molestation against him at the police station, he then proceeded to the Sebenza Police station wherein he was informed that they do not have such case. He then proceeded to the child's (victim's home) to go and inquire what the problem was. The police where then called and he was then arrested.

[34] The actions of the applicant does not show any tendency of a person who is a flight risk, if he really wanted to run away he could upon hearing that a case of child molestation has been opened against him then decide to run away.

[35] It is not in dispute that he has a valid passport, notwithstanding the fact that the state, the police, did not go and verify its authenticity with the Department of Home affairs.

[36] There is thus very little risk of the applicant absconding. The true consideration is therefore whether or not the Appellant would stand trial

[37] It is noted that Applicant is aware and knows where the family, and victim resides, however due to the fact that the state did not pursue or abandoned, during its submission at the bail hearing, the alleged intimidation of witnesses by applicant or his family and also the Learned Magistrate did not deal with it during his judgement, am satisfied that the applicant will not interfere with witnesses

[38] I am satisfied that the applicant during his bail application succeeded in showing that he is not flight risk, that other than the offence he is presently facing, he had been law abiding citizen and thus dispelling the idea of reoffending, his further incarceration would deprive him of earning a living and that the likelihood of interfering, intimidating or influencing state witnesses was almost zero regard been had to the fact that the court will impose conditions upon him.

[39] Bail conditions have always served to ensure that whatever fears the state might have in the release of an accused person is taken care of. It is a necessary consideration as also envisaged in section 60(6) which provides that in considering whether the ground in subsection (4)(b) and (c) has been established, the court may, where applicable, take into account the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached

[40] In S v Branco 2002(1) SACR 531 (SCA) at page 533 Cachalia AJ held:

"The fundamental objective of the institution of bail in the democratic society based on freedom is to maximise personal liberty**.** The proper approach to a decision in the bail application is that: The 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." (Court emphasis)

[41] The State case is based on circumstantial evidence, the appellant has co-operated with the police, Each of the provisions of section 60(4) (a – e) have been taken into consideration and there does not seem a reason for not granting bail

[42] That being so, I conclude that the Learned Magistrate in the court a quo, exercised his discretion wrongly in concluding that there were no exceptional circumstances in the case and as a result applicant is entitled to be released on bail pending finalisation of his trial

[43] The appeal against the refusal of release on bail in respect of appellant is hereby upheld and the decision refusing the bail application is hereby set aside and substituted as follows:

43.1 Accused is granted bail in the amount of R10 000,00 (Ten Thousand Rand) on the following conditions:

43.1.1 that accused appear and remain in attendance at each and every date to which this matter is postponed until excused by the court

43.1.2 that accused must report twice per week, that is, on Mondays between 06:00 and 09:00 and on Fridays between 18:00 to 21:00 at the Sebenza/ Edenvale Police Station;

43.1.3 that accused may not have any contact or communication, directly or indirectly, with any of the state witnesses;

43.1.4 that accused surrender his passport and other travel documents to the Station Commissioner, Sebenza/Edenvale SAPS, and do not apply for any new travel documents without the leave of the court.

43.1.5 that accused may not leave the jurisdictional area of the City of Ekurhuleni save with the written permission of the investigating officer in this matter;

43.1.6 that accused would reside at […] C. Avenue Eastley Edenvale until finalisation of this matter.

43.1.7 that accused will notify the Investigating officer of any changes

of his address and such notification to be given at least seven days before moving out of the known address to the investigating officer;

43.1.8 that the investigating officer is hereby forthwith directed to furnish the station commissioner of Sebenza/ Edenville Police Station with the court order herein.

43.1.9 that the station commissioner of Sebenza/ Edenville police station or any person designated thereto by the station commissioner Sebenza/ Edenville police station, is hereby directed to immediately inform the investigating officer should accused herein default in reporting as set out in above.

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C K Matshitse

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard 08 May 2017

Judgment delivered: 12 May 2017

Appearances:

For Appellant: Mr A J Masiye

Instructed by: AJ Masiye Attorneys

For Respondent: Adv Ntlakaza

Instructed by: Office of the DPP