REPUBLIC OF SOUTH AFRICA

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

CASE NO: A207/2017

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

……..……..... …7/8/2017…
SIGNATURE DATE

In the matter between:

AMBROSE MBELE

Appellant

and

THE STATE Respondent

JUDGMENT

MSIMEKI J,

INTRODUCTION

[1] This is a bail appeal brought by the appellant, Mr Ambrose Mbele, whose application for bail was refused by the Regional court Magistrate in Protea, Soweto, on 24 May 2017.

[2] The appellant was duly represented when he applied for bail.

[3] He was represented by Mr Makungo when the appeal was heard while Mr Nel represented the State.

[4] Mr Makungo, at the outset, and on behalf of the appellant applied for condonation for the late filing of the appellant's Notice of Appeal. The application was not opposed by Mr Nel and was duly granted.

[5] Applications for bail are governed by **Section 60 of the Criminal Procedure Act 51 of 1977** (the "CPA").

[6] It is common cause that the charge that the appellant currently faces is a **Schedule 6** offence. **Section 60(11)(a) of the CPA** finds application in this matter.

The **Section** provides:

> *""(11) 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" (my emphasis).

[7] Appeals from the lower courts are regulated by **Section 65(1)(a) of the CPA**. The Section provides:

> *"**65 APPEAL TO SUPERIOR COURT WITH REGARD TO BAIL***
>
> *(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting*". (my emphasis).

[8] What the court or judge hearing the appeal should do is covered by **Section 65(4) of the CPA**. This Section provides:

> *"(4) 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".* (my emphasis).

[9] Courts have had occasions to deal with what "exceptional circumstances" mean. The constitutional Court **in S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)** noted that **Section 60(11)(a)** limits the right enshrined in **Section 35(1)(f) of the Constitution** but added that such limitation was reasonable and justifiable in terms of **Section 36 of the Constitution** in our current circumstances. This comes clearly in the judgment of Kriegler J who wrote the unanimous judgment of the court. See: paragraphs [75] and [76] of the judgment. For completeness sake I shall refer to **Section 35(1)(f)** and **Section 36 of the Constitution**.

[10] **Section 35(1)(f)** provides:

"***Arrested, detained and accused persons***

35. (1) Everyone who is arrested for allegedly committing an offence has the right—

(a) …

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions".

Section 36 (1) provides:

*"**Limitation of rights***

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

While **Section 36(2)** provides:

"(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

[11] In **S v Botha en 'n ander 2002 (1) SACR 222 (SCA)** Viviers ADCJ concluded that insofar as Section 60(11)(a) is concerned, an accused person, on a balance of probabilities, has to convince or satisfy the court:

"[20] …eerstens dat daar buitengewone omstandighede bestaan wat sy of haar vrylating toelaat en, tweedens, dat sodanige buitengewone omstandighede die vrylating in die belang van geregtigheid verloorloof". (See: in this regard paragraph [20]).

[12] Snyders JA, in **S v Rudolph 2010 (1) SACR 262 (SCA) at 266h-i** came to the conclusion that "ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified". (See: also **S v DV and Others 2012 (2) SACR 492 (GNP) at [7]**).

[13] Van Zyly J, in a full court decision, observed that there are "varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference". In the context of **Section 60(11)(a)**, the court said that the exceptionality of the circumstances must persuade the court to find

that “it would be in the interests of justice to order the release of the accused person”. (See**: paragraph [55]** in this regard).

[14] Coming back to the facts of the current case, Mr Makungo for the appellant, submitted that the appellant, on a balance of probabilities, satisfied the requirements of **Section 60(11)(a)** and that he should be granted bail. Mr Nel, for the respondent disagreed.

[15] The personal circumstances of the appellant are set out in his founding affidavit. He is 57 years old; a South African citizen who has completed his Grade 11 in 1981; he is married with four adult children; and whose address has been verified.

[16] The appellant, in his affidavit, alleged that he has a previous conviction of assault which was committed in 1991. The SAP69 however, reveals that he was convicted in 2005 and not 1991. I shall deal with this later.

[17] Mr Makungo, for the appellant, argued that the State’s case was weak. He bases the argument on the fact that the complainant (victim), according to him, contradicts herself. The complainant is said to have said that the assailant was unknown. It was argued that the complainant first told the first report that she was raped twice and then changed her version and said that she had been raped three times. The proper reading of paragraph three of the statement of A K, the first report, clearly shows that the complainant referred to the assailant as an “unknown male to me from the front opposite house”.

This can only mean that the assailant, who was from the front opposite house, was known to the complainant.

[18] What the complainant conveyed to the first report becomes clearer when one reads it in conjunction with the statement of the investigating officer, Detective Warrant Officer, Jabu A Xaba. The complainant's statement in this regard, is also instructive.

[19] All it means is that the complainant alleged that she was raped by the appellant on 6 May 2017 and twice on two previous occasions. This cannot be said to be any contradiction at all. The court *a quo* has also so found.

[20] Mr Makungo also conceded that the identity of the assailant was not in issue. That the rape of the complainant, by the appellant, on the two previous occasions had not been reported as argued by Mr Makungo, in my view, takes the matter nowhere.

[21] Mr Makungo argued that the statement that the "victim is mentally challenged" cannot simply be accepted like that as she needed to undergo medical examinations and tests. This, because the statement, according to him, had not come from a doctor. Shown that the victim had been seen by a doctor as the J88 discloses, Mr Makungo then conceded that that, indeed, was the case.

[22] Mr Makungo further submitted that there was only evidence of old and healed injuries. The submission, in the face of what the doctor says in the J88 cannot advance the appellant's case. The doctor, *inter alia*, says:

1. On page 1, Part B under General History, that "the victim is "mentally challenged".
2. Under general Examination in Part C of the J88 in paragraph 8, the doctor states that "absence of injury does not exclude sexual assault".
3. In Part F of the J88 under samples Taken for Investigation, in particular paragraph 3, the doctor concluded that "clefts on hymen indicate penetration of vagina with blunt object".

This, in my view, negates Mr Makungo's argument that the State's case is weak.

[23] It is noteworthy that Mr Makungo conceded that the appellant's statement that he was convicted of assault in 1991 gives the impression that that occurred many years ago and that the previous conviction, therefor, deserved to be disregarded. The statement clearly shows that the appellant was sure of his facts which are refuted by the SAP69 which discloses that the previous conviction is that of 2005 as correctly submitted by Mr Nel.

[24] Mr Makungo's submission that the appellant, as a business man, would suffer immensely if he was not granted bail was said not to be holding water by Mr Nel who argued that no evidence had been presented to show that his

wife and his adult children could not run his business in his absence. Mr Nel's submission has merit.

[25] The court *a quo's* decision shows that the fact that the appellant was said not to be a flight risk could not be viewed in isolation. Mr Nel argued that other factors such as the fact that the victim was mentally challenged had to be considered as that made the case serious. He submitted that the victim being mentally challenged could be easily influenced by the appellant. This, indeed, would amount to tampering with the State witnesses.

[26] Mr Makungo referred the court to **S v D and Others 2012 (2) SACR 492 (GNP)** in which Legodi J said that the low risk pertaining to flight, the absence of the likelihood of interference with State witnesses and the low risk of reoffending constituted "exceptional circumstances". This, as shown above, does not appear to be the case in this matter.

[27] Mr Makungo, again, referred the court to **S v Botha and Another 2002 (1) SACR 333 (SCA)** where the court said that exceptional circumstances existed where the accused proved that the State's case was weak. This, at this stage, appears not to be the case.

[28] The test at the end of the application is whether the requirements of section 60(11)(a) of the CPA have been met. Differently put, the question which immediately comes to mind is whether the appellant has adduced

evidence which satisfies or convinces the court that exceptional circumstances exist which in the interests of justice permit his release.

[29] The other important question to be answered is whether the decision of the court *a quo* was wrong. This has not been shown by the appellant.

[30] The evidence adduced by the appellant, in my view, in the light of what I have said above, does not show that the court ***a quo's*** decision was and is wrong. The appeal, in my view, should fail.

ORDER

[31] **I, in the result, make the following order:**

The appeal against the court a quo's decision to refuse to admit the appellant to bail is dismissed.

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M. W. MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Date of hearing: 4th August 2017

Date of judgment: 7th August 2017

Counsel for Appellant: Advocate L. Makungo

Counsel for Respondent: Advocate P. Nel