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Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT KIMBERLEY)**

Case number: **CA&R 585/17**
Date heard: **21/11/2017**
Date delivered: **01/12/2017**

In the matter of:

SIPHO SHABALALA

Appellant

and

THE STATE

Respondent

Coram: Snyders AJ

JUDGMENT

SNYDERS, AJ

1. On 23 May 2017, the appellant was refused bail by Magistrate F Erasmus, a district Magistrate at the Kakamas District Magistrate's Court. This appeal lies against that refusal. The appellant was charged with assault with the intent to do grievous bodily harm

("assault GBH") (committed on 06 August 2017), housebreaking with the intent to commit an offence unknown to the State (which took place on 07 August 2017), pointing of a firearm (perpetrated on 07 August 2017) and intimidation (committed on 07 August 2017). The appellant was also charged with two counts rape and assault GBH, committed on 29 November 2016. The offences are categorised a schedule 6 offence in terms of the Criminal Procedure Act, 51 of 1977 ("the CPA").

2. In his grounds of appeal it was contended on behalf of the appellant that the Magistrate erred in the following respects:
 - 2.1 He did not properly consider the conduct of the appellant during the arrest;
 - 2.2 He failed to consider the provisions of s 60(4)(b) of the CPA;
 - 2.3 He failed to give sufficient consideration to the factors listed in s 60(11) of the CPA;
 - 2.4 In finding that there was a strong case against the appellant; and
 - 2.5 By finding that the appellant had not shown exceptional circumstances, which would release in the interests of justice justify his;
3. The appellant testified during the bail proceedings in the court *a quo*. All the charges preferred against him relate to one

complainant. He was in a love relationship with her since 2013 and they resided together intermittently. He denied the charges against him and elected not to testify on the merits of the case. He is thirty six years old with a fixed address situated at Keimoes Barracks and has resided there since 01 August 2017. He has been employed by the South African Police Service for the past thirteen years and is presently on unpaid leave. The appellant provides for his three minor children, aged four, eight and eleven years, respectively. The four year old son is the appellant and complainant's son. The appellant also supports his aged mother who resides in Johannesburg. The appellant is unable to provide for his dependants due to his absence from work.

4. The appellant testified that he has no fixed or moveable assets or a passport. He does not have any previous convictions, nor pending cases against him. He has no health issues, aside from high blood pressure. When the investigating officer informed him of the charges, he says he handed himself over and was informed that the complainant had filed a withdrawal statement. The investigating officer initially told him that the docket would be sent in for a decision but arrested him later that day. Upon his arrest, the investigating officer allowed him to buy cigarettes at a certain shop, while the investigating officer sat in the car outside. When

he returned to the vehicle after purchasing the cigarettes, he was taken to court.

5. It also emerged during the appellant's testimony that the complainant had previously withdrawn the two charges of rape in issue and consequently, the Director of Public Prosecutions ("DPP") declined to prosecute. However, he said he understood that the DPP was at liberty to re-instate same. The appellant explained that, even though the complainant is the mother of his child, he has a debit order on his bank account to cater for the child's maintenance. He was of the view that none of his police colleagues would risk giving him a firearm having regard to the charges against him.
6. It further emerged under cross-examination that the appellant aims to depart to Johannesburg once he gets paid. He gave the assurance that some of his colleagues know where he resides in Johannesburg. The appellant also plans to apply for a work transfer out of Keimoes.
7. The investigating officer testified to the merits of the charges. On 29 November 2016, the complainant had a party at her home, which the appellant attended. She went to sleep after the party and woke up when she felt somebody on top of her. She discovered that

she was only dressed in her brassiere. She noticed that the appellant was having intercourse with her without her consent and tried to push him away. The appellant overpowered her and continued to have intercourse with her. After the intercourse, the complainant went to sleep on the sleeper couch in the house. The appellant again approached her and lay between the complainant and her son. He had sexual intercourse with the appellant for the second time without her consent. After the intercourse, the appellant went to the bathroom and the complainant escaped and jumped through the window. She ran to the neighbour's house in only a towel and seemingly reported the rape to them. The SAPS found her at the neighbour's house. After the police collected her clothing, she went to the police station to lay the charges.

8. According to the investigating officer, after the first sexual encounter, the appellant pushed the complainant and she fell. No DNA genetic samples were collected from her and neither did she undergo any medical examinations. On 30 November 2016, the complainant filed a withdrawal statement, which reads as follows:
"...Ek het nadat ek die saak aangemeld het besef dat ek oorhaastig opgetree het. Ek en die beskuldigde is alreeds 7 jaar saam en het 2 seuns van onderskeidelik 3 en 6 jaar oud. Die Beskuldigde is ook die enigste broodwinner en dit is ook die heel eerste keer dat hy my

so aanrand en verkrag het. Ek wil hom dus nog 'n kans in die lewe gee..."

9. Concerning the charges relating to 06 and 07 August 2017, the investigating officer testified that according to the complainant's statement, the appellant threw a bottle at her on 06 August 2017. The incident happened before the court building. The complainant was bleeding from her head where the bottle struck her. She, it appeared, did not intend to lay a charge for this incident. When she reported the incident of 07 August 2017, she mentioned the assault of 06 August 2017. The State opened the docket for the incident of 06 August 2017. There is no affidavit pertaining to this incident and therefore the full factual matrix of that incident was not provided.
10. On 07 August 2017, the complainant was sleeping at home when she woke up to a firearm in her face. The appellant was pointing the firearm at her while she was pleading with him and crying. The appellant said that if he cannot have her, nobody would. He threatened to kill her and then kill himself. She managed to convince him not to proceed with his actions. The appellant left the firearm at the complainant's house and went to a shop. After he had left, she took the firearm and ran to the neighbour's house. The SAPS were summoned and the firearm was confiscated.

11. According to the investigating officer, on 07 August 2017, the appellant booked out a service weapon at work. In terms of the weapons register, this was the only occasion that the appellant had booked out a service weapon. He had been issued with a personal firearm, which he handed in permanently during 2013. The investigating officer was of the opinion that the appellant would easily be able to access a firearm. He was further of the view that strict bail conditions would not guarantee the safety of the complainant.
12. The complainant once again did not undergo medical examinations for the 06 August 2017 assault. Photographs taken of her, however, show her injuries. The investigating officer was not convinced that the complainant would give her co-operation in the trial because on 09 August 2017, the complainant filed a withdrawal statement for these incidents and stated the following:
"...So I have decided to withdraw the case because he apologised to me and promised not to come (sic) to me or disturb me. That I am going to apply for a protection order against him."
13. What is of interest is the information the investigating officer disclosed regarding the appellant's address at the Keimoes Barracks. He said that the appellant was handed the keys to room numbers 18 and 28 when he lodged his residential application on 02

August 2017; his application for accomodation was unsuccessful; and although he had the keys, he never resided there.

14. The Magistrate found that there were a number of 'red flags' raised in the State case, especially the version of the complainant in refusing to undergo medical testing and withdrawing the charges. He was of the view that the complainant's level of intoxication during the November 2016 incidents, may also play a role in weakening the State case. However, the fact that the complainant fled the house nearly naked to the neighbour's house, clearly shows that something must have happened.
15. The Magistrate reiterated that the recent charges of August 2017, had caused the rape charges to be re-instituted, bringing the bail application within the purview of Schedule 6 of the CPA. He held that the appellant had to show that exceptional circumstances exist which in the interests of justice permit his release on bail. He had regard to the appellant's personal circumstances and the strength of the State case.
16. What was strange, the Magistrate said, was that the appellant booked out a service pistol; entered the complainant's home; threatened her with the firearm; and relented and left the firearm to go to the shop. Judging the case on probabilities, the Magistrate

found that, though untested, the complainant's version had a ring of truth to it. He further found that the appellant could easily access a firearm and that stringent bail conditions will not alleviate the threat. He reasoned that no exceptional circumstances existed which in the interests of justice would permit his release on bail.

17. Section 60(11)(a) of the CPA stipulates:

'(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...'

18. Section 65(4) of the CPA 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."

19. This court may interfere with the Magistrate's decision if it is satisfied that the decision was plainly wrong. The appellant carries the burden to show that exceptional circumstances exist.

20. In *S v Viljoen*¹, the SCA relied on the dicta in *S v Jonas*² and held as follows:

'The term "exceptional circumstances" is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, eg he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.'

21. Mr Jankowitz, for the appellant, argued that the Sate case is weak and that this constitutes substantial and compelling circumstances. Even though the complainant withdrew the charges, there are sufficient independent factors to substantiate the allegations she

¹ 2002 (2) SACR 550 (SCA) at para 12

² 1998 (2) SASV 677 (SOK)

made. She reported the rape to the neighbours in a near naked state. There are photographs depicting the assault GBH. It was common cause that the appellant handed in his personal firearm in 2013 and the State would be able to prove that he booked out the firearm on 07 August 2017. The State could show that the complainant ran out of the house with the firearm and handed it to the police. This demonstrated that something amiss must have happened.

22. The withdrawal statements of the charges did not entail that the complainant laid false charges against the appellant, but instead set out a number of other reasons for the withdrawal. The test is to determine *prima facie* the relative strength of the State case and not make a provisional finding of innocence or guilt.³ That being said, the appellant has not discharged the *onus* of showing exceptional circumstances which in the interest of justice permits his release.

23. I am also of the view that, regard has to be had to the factors listed in s 60 (4) of the CPA, the relevant part of which reads:

'(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

³ See *S v Botha & Another* 2002 (2) SA 680 (SCA) at para 25

- (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 1 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 jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;*
- (e) *where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security'*

24. The Magistrate found that the appellant will not evade his trial if released on bail. I do not agree. The appellant expressed his wish to obtain a transfer from his work and move to Johannesburg. He did not furnish his Johannesburg address. He also does not have a fixed address at the Keimoes Barracks. To my mind, this plays a role in determining whether there is a likelihood, on a balance of probabilities, that the appellant will evade his trial. The appellant

was clearly dishonest when he testified about residing at the Barracks.

25. The Magistrate was concerned with the appellant's access to a firearm and the fact that he entered the complainant's home when uninvited and was not involved in any romantic relationship with her. The appellant had already faced two rape charges at that time, which were withdrawn at the behest of the complainant. Under those circumstances, the Magistrate's reasoning regarding the complainant's safety, cannot be faulted. He stated as follows in the judgment:

"If you did point the firearm at the complainant, something happened to change your mind. The question is what will happen if there is a next time? The question is, is can I say that there won't be a next time?"

26. The following was said in *S v Mohamed*⁴:

"To sum up: the appeal by an aggrieved accused under sec. 97 of the Code to a Superior Court against a decision of a magistrate in respect of his application to be released on bail, is an appeal in the wide sense, that is, it is a complete re-hearing and re-adjudication by the Superior Court of the merits of the application, with or without additional information, in which it can, in the exercise of its


⁴ 1977 (2) SA 531 (A) at 542A-B

own discretion, make such order as to it seems just; an appeal against its decision lies to this Court under secs. 21 (1), (2), and (3) of the Supreme Court Act, but only with the leave of the Court a quo, and, if it is refused, with the leave of this Court; on such an appeal this Court will only interfere if the Court a quo committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision."

27. The appellant's personal circumstances and the strength of the State's case do not constitute the existence of exceptional circumstances. The likelihood that the accused may evade his trial and interfere with the State witnesses, do not, in the interests of justice, warrant his release on bail. I am not swayed that the Magistrate exercised his discretion incorrectly. It follows that the appeal must fail.

28. I therefore make the following order:

1. THE APPEAL IS DISMISSED.



J.A SNYDERS

ACTING JUDGE

<u>On behalf of Appellant:</u>	Adv D Jankowitz (oio Fletcher's Attorneys)
<u>On behalf of Respondent:</u>	Adv K Ilanga (DPP)