IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS91/2014

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

22 June 2016 **……..**

DATE SIGNATURE

In the matter between:

HEWITT, ROBERT ANTHONY JOHN Applicant

and

THE STATE Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. *Adv Green* who represents the accused approached me shortly before 10am at the request of the Deputy Judge President to allocate, as the senior criminal court judge on duty, a judge to hear an application for the extension of bail pending an application for direct access to the Constitutional Court.

2. The reason for her having to approach the DJP was because the trial judge, my brother Bam J, was on long leave

3. I was already dealing with a criminal case which was due to start at 10am. Counsel impressed on me the urgency, advising that the investigating officer told her that the accused would be arrested if a judge could not be secured to hear the application by 11am. The accused had come to hand himself over to the Registrar as the Supreme Court of Appeal (SCA) had refused his petition to appeal but he had also brought the application for extension of bail.

   In view of the apparent deadline imposed I decided it preferable to take the case immediately.

4. On arriving in court I attempted to establish the State's attitude to the bail application and indicated that someone representing the State would have to be in court, even if only to confirm that there would be no opposition. This led to a short adjournment and I proceeded with the other case. Counsel later advised that Adv Coetzee, who had handled the trial, was on her way and that the instruction was to oppose bail.

5. When the matter eventually proceeded Adv Coetzee informed the court that the application could not be for the extension of bail since the accused had already been arrested. This was of concern since this court had already been seized of the matter prior to 11am. It was then revealed that the accused had in fact been arrested at about 10am while in court waiting for his application to

proceed. It also appears that the investigating officer refused to accept the application to extend bail.

6. It is evident that the effect of the arrest precluded the court from deciding whether to extend bail. It was now a question of whether to grant bail. In cases where papers have been served in order to obtain relief it would amount to a constructive contempt if the other party acted in a way that would have the effect of frustrating the grant of an order, provided the other requirements for contempt were satisfied. Where another organ of state acts in a manner which amounts to constructive contempt then concerns may also arise concerning a possible impingement of the separation of powers.

7. The court therefore expressed concern at the arrest being effected despite the accused meeting the deadline. The arrest of the accused also meant that the court no longer had the ability to consider any papers other than the application and, at the request of the court, the judgment of Bam J. It also meant that the application required urgent disposal.

8. In view of *Adv Coetzee* for the State accepting that the application could be regarded as a fresh one for bail without the need to amend and that the State did not intend to file an answering affidavit, it became unnecessary to interrogate whether the State had given a deadline and whether its terms had been breached when the accused was arrested in court while waiting for it to convene.

9. In a material way the arrest of the accused precluded the court from exercising an option it otherwise would have had if the accused was still on bail to adjourn and allow the State to file an answering affidavit without necessitating the incarceration of the accused pending the outcome of the application.

10. It must be borne in mind that the trial judge will ordinarily preside in an application for bail pending appeal. Ideally, when the trial judge is unavailable, it would be preferably for the judge seized with the bail application to gain a

better insight into the record of the proceedings. Obviously this was not possible in the present circumstances.

11. The case therefore had to be dealt with as an urgent application requiring a robust appraisal and speedy determination with all the inherent limitations that these factors entail.

REQUIREMENTS FOR BAIL

12. It appeared to be common cause that the accused had to demonstrate that there was an arguable case to take to the Constitutional Court.

13. The accused submitted however that sections 60(1), (4) and (11) (a) of the Criminal Procedure Act 51 of 1977 ('the CPA') did not apply because they only refer to an offence of *"(r) ape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007"* (*'the Sexual Offences Act')* whereas the accused was charged and convicted of common law rape.

14. This argument overlooks that the Sexual Offences Act was introduced to include and extend the common law crime of rape and that in terms of section 68 of that Act schedule 6 of the CPA was amended to replace the common law crime of rape with offences under ss 3 and 4 of the Sexual Offences Act[1]. The argument also overlooks that all the elements of common law rape with which the accused was charged and convicted were statutorily codified and then extended by this Act.

15. In terms of section 12(2)(b),(c), (d) and (e) of the Interpretation Act 33 of 1957 a repealed provision remains effective in respect of anything done while it was in operation and does not affect any punishment incurred in respect of any offence committed under the repealed law. The relevant provisions read:

[1] See the Schedule to the Sexual Offences Act as read with section 68(2)

12 Effect of repeal of a law

(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

(a) …

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

16. I am satisfied that the accused, by reason of being charged and convicted of a schedule 6 offence which has since been repealed and re-enacted, is required to demonstrate that in terms of section 60(1)[2] of the CPA it is in the interests of justice to permit him to be released on bail, must demonstrate that

[2] s*60 Bail application of accused in court*

(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

the provisions of section 60(4)[3] are not applicable to him and that exceptional circumstances are present as contemplated under section 60(11) (a)[4] of that Act.

WHETHER THE REQUIREMENTS OF s.60 HAVE BEEN MET

17. The accused was previously granted bail after he was convicted and sentenced. He has complied with all his bail conditions. Adv Coetzee correctly accepted that nothing had changed to justify a reconsideration of the factors which led the trial court to grant bail on the basis that exceptional circumstances existed and that it was in the interests of justice to grant bail, having due regard to the requirements of s.60(4).

She however contended that that there was no jurisdictional basis upon which the Constitutional Court could be seized of the matter and built this into an argument that there was no reasonable prospect of success. .

[3] *S60 (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:*

(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;

[4] *S60 (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;

PROSPECTS OF SUCCESS

18. The thrust of Adv Coetzee's argument is that the Constitutional Court would not entertain the application for direct access because the issue does not fall within its jurisdiction as circumscribed by section 167 of the Constitution.

19. Section 167(3) provides:

> *The Constitutional Court-*
>
> *(a) is the highest court of the Republic; and*
>
> *(b) may decide-*
>
> *(i) constitutional matters; and*
>
> *(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and*
>
> *(c) makes the final decision whether a matter is within its jurisdiction.*

20. The issue which the accused wishes to raise is that there is new evidence which materially affects the outcome of the case. It is not disputed that the evidence only surfaced after the SCA refused the petition for leave to appeal.

    Reliance is placed on a series of emails between the victim complainants of the rape charges in count 1 and 2 and on which the accused was convicted. A third complainant is also referred to in the emails. She was the victim of the indecent assault charge, being count 3, and in respect of which the accused was also found guilty.

21. The emails originated in June 2012, which was well before the accused was charged. It reveals that conversations took place between the two rape victims concerning the charges they wished to bring against the accused. At face value it is understandable that rape victims would seek each other out. The degradation, humiliation, scepticism and lack of support on the part of family (as clearly is evident in the case of one of the victims as described in the judgment) and the need to find mutual support among victims is readily understandable, particularly considering how young they were at the time of the offences with which the accused was convicted.

22. However the court relied on similar fact evidence in support of the decision to convict. It appears that the court was conscious that similar fact may be manufactured and considered the argument advanced on behalf of the accused that the complainants had colluded. At para 40 of the judgment the trial court said:

> *"In my view there is such a striking resemblance in the versions of the respective complainants in regard to the pattern followed by the accused, and his modus operandi taking into account that there was no evidence indicating any collaboration or collusion between the three complainants, or a possible conspiracy, to falsely implicate the accused, that coincidence can be ruled out. The only material difference between the three charges is that the accused did not have intercourse with AW."*

The court then proceeded to identify eight pieces of similar fact evidence and continued at paras 42 and 43 to state:

> *"42. The probative value of the similar fact evidence is so high that it clearly established a systematic course of conduct by the accused. For that reason the similar fact evidence is relevant and admissible."*

43. It follows that the similar facts are mutually corroborative of the versions of all three complainants and that it consequently serves as further guarantee for the truth of their versions"

23. I hasten to add that due to the urgency counsel was not able to supply me with a transcript of the proceedings, and even if they had, it appears that the record would have been too lengthy to have considered in the time available to make a decision. I am therefore reliant exclusively on the contents of the judgment although Adv Coetzee indicated that the transcript of the evidence would show the context in which these passages of the judgment are to be understood.

24. I am limited to what is before me and, at face value, the trial judge's reasoning as to the acceptance of similar fact evidence as a material part of the evidence against the accused, which was premised on an acceptance of the complainants'' testimony that they did not have contact and that they could not have colluded to manufacture evidence.

25. Prior to entering court I had an opportunity of reading the application. Although not raised by Adv Green a concern that arose when looking at the emails were the following exchanges on 7 June 2012:

At 10h22 from S to TT:

"*I have the criminal case in hand. You guys can all act as witnesses. Unfortunately for the South African's if penetration did not occur there is no backlash"*

At 12h34 from TT to S:

"So you saying if he did not have penetrative sex with his penis it does not count? What about finger? What about oral? Just checking so we know who is on board and how far we can go"

At 12h45 from TT to S:

> "*Hang on I am getting confused. Do we have a case if there was no penetrative with a penis?"*

At 12h49 from S to TT:

> "*The Act doesn't say what must penetrate so penetration is penetration"*

26. I am not suggesting that there is no rational explanation for raising these apparent concerns. They may have been communications regarding other possible victims who had been sexually assaulted but not to the extent which would constitute common law rape. Again I do not have the context to work on; that can only come from a consideration of the record, whether it was a general discussion and any other relevant emails that may have passed during the period in question.

27. However, it is evident that defence counsel, if possessed of these documents at the time of the trial, could have started immediately by enquiring, for instance, why the two complainants were querying about the acts which would suffice to constitute rape under our law and the actual discussions about the extent to which they prepared discussed the actions of the accused.

28. As I have indicated the context may provide a perfectly rational explanation. But if the complainants are unable to satisfy a court as to why they engaged in this discussion and how limited the discussions were then this may become directly relevant and impact on whether the state proved its case beyond a reasonable doubt.

29. Both sets of evidence which rely on the actual correspondence between the complainants appear at face value, and if regard is had to the judgment, to be relevant and might possibly have altered the effectiveness of cross

examination, the acceptance of similar fact evidence and the outcome of the trial. Once again I accept that this is without having the benefit of the full transcript or other emails at the time which may contextualise these communications in a completely acceptable light. It is axiomatic that the trial judge would know whether the emails may have affected the outcome of his decision and that I can only work from the standpoint that the State cannot say that it might not have done say.

30. Accordingly the emails appear relevant because in the first instance they appear to contradict what appears to have been the evidence of the complainants in court that they had no contact with each other; a factor relevant to the material finding by the court of the acceptance of similar fact evidence. The emails are also relevant because they raise the question of why the two rape complainants would be discussing between them whether anything short of penetration would still constitute rape.

31. The question is whether seeking to introduce this new evidence and re-open the case would constitute either a constitutional issue or one which raises an arguable point of law of general public importance which ought to be considered by that Court as required by s.167 of the Constitution.

32. Adv Green argues that it comes down to the right of a fair trial which under section 35(3) (i) of the Constitution includes the right to adduce and challenge evidence. She also relies on subsection (o) which is the right of appeal to a higher court, although I am not certain that in the present case that is not putting the cart before the horse.

33. Even if the accused is incorrect, it is apparent that he is placed in an invidious position. The SCA has refused his petition. This occurred prior to the new evidence becoming available. If the accused had known of the emails at the time the petition was brought he could have introduced it and requested the court to exercise its powers under sections 19(b) and (c) of the Superior Courts Act to:

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary;

34. If the accused attempted to do so now the SCA may say that his remedy is to approach the Constitutional Court. If he however approaches the Constitutional Court and that court considers that it cannot entertain the application for direct access by reason of the provisions of s.167 he can then attempt to approach the SCA. If the Constitutional Court refuses the application on the merits then *caedit questio.*

35. It seems to me that if an appeal court comes to the conclusion that the new evidence ought to be received then that would constitute an exercisable right. If a right exists then the law will provide a remedy. See *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at p781A-B. I should not non-suit where I am unable to say, and may not be competent, having regard to the issue, to pronounce on whether the Constitutional Court will exercise jurisdiction in a case where, if it does not have jurisdiction then the SCA will by reason of its powers under section 19 of the Superior Courts Act. Moreover there is no suggestion that the accused is deliberately approaching the incorrect forum to seek a reopening to introduce new evidence.

36. Accordingly the question should rather be framed as what is the threshold level for the merits of the appeal, and in this case it ought not to matter whether that appeal is properly directed to the Constitutional Court or the SCA once I have found that a right exists since, under section 167(3) (c) of the Constitution only the Constitutional Court can finally determine whether a matter is within its jurisdiction. A further question is how does the issue of prospects of success fit into the bail regime determined by section 60 of the CPA.

37. Adv Coetzee referred to *S v de Villiers 1999(1) SACR 297 (O)* at 310C-E which according to her requires a separate enquiry into the prospects of success. I would however refer to *S v Hudson 1996 (1) SACR 431 (W)* at 433I-434D which dealt extensively with how the test of "reasonable prospects of success was to be applied. The court said:

> *"I will place no reliance on (but am aware of) the dictum in S v Williams (supra at 1172H) which reads: 'It is putting it too high to say that before bail can be granted . . . there must always be a reasonable prospect of success on appeal.' In S v Richardson 1992 (2) SACR 169 (E) Erasmus J explained why the desirability that sentence be served as soon as possible if there is no reasonable prospect of success on appeal, 'should be applied with circumspection and care, and only in clear-cut cases'. (My emphasis.) In S v Anderson 1991 (1) SACR 525 (C) Marais J, with reference to a case where there is no reason to be concerned about whether or not the applicant will abscond, did not support an enquiry whether there 'is' a reasonable prospect of success. He said that if the appeal is 'reasonably arguable and not manifestly doomed to failure', the lack of merit in the appeal should not be the cause of a refusal of bail. I agree. I add that if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full rehearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal 'will succeed' but, on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. Cf S v Moeti 1991 (1) SACR 462 (B) wherein it was said that the applicant for bail must convince that there is 'a reasonable possibility' that the appeal will avert imprisonment."*

38. In *S v Scott-Crossley* 2007(2) SACR470 (SCA) at paras 5 and 7 the court referred to the relevance of prospects of success in cases not covered by

section 60(11) of the CPA, but that in a section 60(11) situation where there has been a conviction for a serious offence the consideration of prospects of success does not of itself constitute an exceptional circumstance but is one of the considerations to be weighed in determining whether exceptional circumstances exist. In para 7 the court also dealt with the level of examination of prospects of success required of the court hearing the bail application. The court said:

> *'The prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act - the Court must consider all relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release (S v Bruintjies (supra)). In evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court a quo in great detail. If the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow: cf S v Viljoen 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 561g - i. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.'*

In my respectful *Hudson* continues to set out how a court goes about determining the prospects of success and remains to compliment *Scott-Crossley.*

I should add that want of jurisdiction would *per se* have made any appeal futile, but as I have mentioned the issue before me is whether an arguable right exists to introduce new evidence and its possible effect on the outcome. Since I am not the trial judge, if I am to err in making assumptions, then it must be on the side of the constitutional right to liberty.

39. I therefore believe that the minimum threshold has been met for the State not to be able to contend at this stage that the case is unarguable whether for want of jurisdiction to a higher court or otherwise.

40. Adv Coetzee argued that to allow the emails in and reopen the case will reopen the wounds suffered by the complainants and force them again to revisit the degradation and humiliation inflicted on them by the accused. I accept how painful it must be, particularly when they have a right to finality. That is a factor to be considered when weighing whether exceptional circumstances exist. However that would already have been considered by Bam J when he granted bail pending the petition to the SCA.

41. I am not called on to decide whether to re-open the case. That will be the decision of another court. At this stage I must weigh the right to bail and whether the Constitutional Court can be seized of the matter, not what the outcome might be. It also appears in this context that I can take into account the respective prejudice and balance of convenience that may be suffered by reference to the right to liberty under section 12 of the Constitution and the right of appeal under section 35(3)(o).

    If I were to refuse bail and the accused is successful with his right of access then he will be deprived of his freedom unnecessarily, bearing in mind that he is an elderly person, and the interests of justice will not be served. If however bail is granted and the right of access is denied then he will proceed to serve his sentence and there can be no adverse consequence to the interests of justice.

ORDER

42. It is for these reasons that I granted bail in the following terms on 20 June:

> *1. That the Applicant is granted bail of R 10 000.00 pending the decision of his application for direct access to the Constitutional Court. Such bail being on the same conditions as previously.*

2. If the application to the Constitutional Court is refused the Applicant will hand himself over to the relevant authorities within 7 (seven) days of the refusal, such authority being the Registrar of the Gauteng Local Division.

3. If the petition to the Constitutional Court is not filed by 1 July 2016 the Applicant undertakes to hand himself over to the Registrar of the Gauteng Local Division by no later than Monday 4 July 2016.

4. The bail paid on 23 March 2015 shall be deemed to have been paid in respect of paragraph 1 of this order it being recorded that the bail receipt of that date has not been refunded.

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SPILG J

DATE OF HEARING:	20 June 2016
DATE OF ORDER:	20 June 2016
DATE OF JUDGMENT:	22 June 2016
LEGAL REPRESENTAIVES:	
FOR THE ACCUSED:	Adv S Green
	A.W. Jaffer Attorneys Associated
FOR THE STATE:	Adv C Coetzee