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

CASE NUMBER: A77/2022
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
10/8/2022

In the matter between:

MUNYAI ELSON NDWAKAHULU APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO J:
INTRODUCTION

[1] This is an appeal against the decision of the Regional Court held at Booysens, not to extend the appellant's bail, pending an appeal in respect to his conviction.

[2] The appellant was arraigned on four counts. He was found guilty on count one and four, which are counts of rape in terms of s3 of the Sexual Offences and Related Matters Act 32 of 2007 ('Act 32 of 2007'), read with the provisions of s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997').

[3] The appellant was sentenced to eight years imprisonment on count one and eighteen years imprisonment on count four. The Court *a quo* ordered that the sentences run concurrently, in terms of s280(2) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977').

[4] The appellant was legally represented during the bail application proceedings.

BACKGROUND

[5] The appellant was granted bail in the amount of R3000.00 on 18 October 2019, together with certain bail conditions, namely, that he could not have any contact with the complainant, P [....] H [....] T [....] 3 and that he could not leave the Gauteng province without the consent of the investigating officer.

[6] The appellant was granted bail and his bail was extended to 12 November 2019, 10 December 2019, 6 February 2020, 27 February 2020, 21 April 2020, 1 June 2020, 19 June 2020, 17 September 2020, 18 September 2020, 22 January 2021, 9 April 2021, 23 June 2021, 2 September 2021, 13 September 2021 and 22 September 2021. On 22 September 2021 the appellant was sentenced and the Court *a quo* cancelled his bail. During the sixteen appearances of the appellant, whilst on bail, he never absconded.

[7] A formal bail application was held on 15 December 2021. The appellant proceeded with his bail application by way of affidavit and the application proceeded under the ambit of a schedule 6 offence. The Court *a quo* dismissed the application for bail. At the time that the bail application was brought, the appellant had not yet launched an application for leave to appeal the conviction or sentence. Leave to appeal the conviction was subsequently granted by the Court *a quo* on 11 March 2022.

[8] In the appellant's notice of motion, the appellant contends that the Court *a quo* misdirected itself in one or more of the following grounds:

‘1. By finding that the Appellant has failed to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permits his release on bail.

2. By finding that notwithstanding the reasonable prospects on the appeal on merits, the Appellant is not a candidate to be released on bail.

3. The Appellant was released on bail prior to his conviction and sentences and he complied with all his bail conditions until the matter was finalised.

4. The learned magistrate erred in not considering the fact that the Appellant is not a flight risk and is an elderly person who has no means to evade serving his sentence in an event his appeal fails.

5. The learned Magistrate erred in not taking into account that there is no risk of interference with any of the state witnesses or the investigations of the matter. The Appellant has moved out of matrimonial house and was residing with relatives. His address was verified by the investigating officer and found to be positive.

6. The learned Magistrate on 11th March 2022 granted the Appellant leave to appeal against both the convictions and sentence, thus conceding that there are reasonable prospects of success against both convictions and sentences.

7. The learned Magistrate misdirected himself in considering imposing stringent conditions attached to the release of the Appellant on bail.

8. The Appellant has demonstrated through his affidavit filed in support of his release on bail that he has economic and family ties within the court’s area of jurisdiction.

9. The Appellant was gainfully employed at the time of his convictions and sentences and there was an undertaking by his employer to take him back should he be released on bail.’

[9] Although the various points mentioned in paragraph [8] *supra* have been cited as grounds for leave to appeal the refusal of bail, not all these grounds were addressed in the affidavit that was read out and handed in by the appellant’s legal representative on 15 December 2021.

[10] The grounds referred to in the appellant's affidavit, which was handed in on 15 December 2021 were the following:

> (a) That the appellant was a 57-year-old male South Africa citizen;
> (b) That he does not have a passport nor any relatives or friends outside the Republic of South Africa;
> (c) That he does not reside in the same place as the complainant and that should he be released he will live at house number [....] I [....] 1 Street, B [....] East, Johannesburg which is owned by his relative, namely, Mr T [....] 1 I [....] 2 S [....] ;
> (d) That he was employed by the University of the Witwatersrand for twelve years as a gardener and earned a monthly nett salary of R6 500;
> (e) That he has three minor children and that he is paying R2000 towards his children per month including medical and schooling needs;
> (f) That he needs to provide support, food, clothing and shelter for his mother who is 85 years old.
> (g) That he never violated his bail conditions and that after being found guilty, whilst on bail,he returned to court for the imposition of sentence;
> (h) That he would not flee or evade the appeal proceedings;
> (i) That he harbours no resentment to any person or the complainant;
> (j) That he corroborated with the police;
> (k) That he has no outstanding or pending cases.

[11] The respondent's counsel contended that the Court *a quo* dealt fully with these aspects and correctly held that the appellant would not stand his trial.

LEGAL PRINCIPLES

[12] It is common cause that the charges fall within the category of offences listed in schedule 6 of Act 51 of 1977.

[13] Section 60(11) (a) of Act 51 of 1977 states:

> ‘Notwithstanding any provision of the 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, give evidence which satisfy the Court that exceptional circumstances of justice, pawning him or her release on bail.’

[14] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed* [1], it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed* [2], it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. So the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant’s release on bail.

[15] In the matter of *S v Mazibuko and Another* [3], the court held that for the circumstance to qualify as sufficiently exceptional to justify the appellant’s release on bail, it must be one which weighs exceptionally heavily in favour of the appellant, thereby rendering the case for release on bail exceptionally strong or compelling.

[16] In the matter of *S v Smith and Another* [4] the Court held 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’.[5]

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[1] *S v Mohammed* 1999 (2) SACR 507 (C)
[2] Mohammed (note 1 above)
[3] *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP)
[4] *S v Smith and Another* 1969 (4) SA 175 (N)
[5] Ibid at 177 e-f

[17] The main considerations for the court in applications of this nature, is the reasonable prospect of success on appeal, the seriousness of the crime for which the appellant has been convicted and whether the appellant is a flight risk. In *S v Williams* [6] the Supreme Court of Appeal held that:

> 'Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial… In my view, to apply this test properly, it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires; that he should be granted bail.'

[18] In the matter of *S v De Abreu* [7] the Court stated that:

> 'the prospects of success on appeal is a factor to be taken into account in an appeal against the refusal of bail [pending appeal]. If, for example, the view of this court should be that the appeal to the Provincial Division is hopeless, this Court would probably be reluctant to alter a judgment refusing bail.'

[19] In *S v Anderson* [8] it was held that it was in fact sufficient if an appeal is arguable and not manifestly doomed to failure. Likewise, in the matter of *S v Naidoo* [9] the Court held that 'the possibility of success on appeal' was sufficient to consider bail.

[20] In terms of section 65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

EVALUATION

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[6] *S v Williams* 1981 (1) SA 1170 (A)
[7] *S v De Abreu* 1980 (4) SA 94 (W)
[8] *S v Anderson* 1991 (1) SACR 525 (C)
[9] *S v Naidoo* 1996 (2) SACR 250 (W)

[21] Prior to his conviction, the appellant stood trial on numerous occasions without ever absconding. Apart from his conviction and sentence, nothing has 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 do so.

[22] It is important to note that this application for bail pending appeal was brought before the actual application to appeal the conviction and sentence. Although the Court *a quo* might not have identified exceptional circumstances at the time of the bail application, the Court should have identified exceptional circumstances once it granted leave to appeal the conviction, in that the Court *a quo*, *prima facie* found that the appellant's appeal was arguable and not manifestly doomed to failure. As a result, the Court *a quo* tacitly conceded that the appellant has reasonable prospects of success on appeal against the convictions, which if over-turned will eliminate the sentence imposed on both counts.

[23] It is not the function of this Court to analyse the evidence in the court *a quo* in great detail, as that may amount to a dress rehearsal for the appeal to follow.[10] However, after a perusal of the record of the court *a quo*, this Court finds that there is a persuasive argument to release the appellant on bail for the following reasons:

> (a) The complainant was twenty-one years old when she testified about incidents that occurred in 2008, when she was nine years old. The other incident occurred in 2017 when she was sixteen years old and a further incident occurred in March 2019. There was delayed reporting of these incidents and the appellant was arrested six months after the last incident was reported in September 2019.
>
> (b) The complainant alleged that the appellant inserted his fingers in her vagina on all these occasions and that it was painful, yet she never elected to tell her mother with whom she had a very close relationship.

[10] see *S v Viljoen* 2002 (2) SACR 550 (SCA) [2002] 4 All SA 10) at 561g-i

(c) The incidents in 2008 happened whilst she was in a taxi on route to the appellant's workplace and also at the appellant's workplace. Although it was painful, this Court finds that the absence of this child screaming or alerting other passengers in the taxi as to what was going on, is an issue which another Court may reach a different decision.

(d) The complainant was sexually active when the doctor examined her, and as a result no conclusion was made on the medical report. Irrespective of this failure to draw a conclusion, this Court finds it strange that the complainant states she had pain each time the appellant inserted his fingers in her vagina, yet she sustained no injuries in her vagina.

(e) The fact that the Court *a quo* did not find the appellant guilty in respect to count two and three raises doubts in this Court's mind as to the credibility of the complainant's testimony.

(f) In addition, when the complainant made her report to her aunt, namely, R [....] T [....] 2, she does not mention the incidents that took place in the taxi.

These are all factors which this Court finds may influence another Court to reach a different decision.

[24] The averments that the appellant would not adhere to any bail conditions imposed, were not contradicted by the State and not dealt fully in the judgement by the court *a quo*.

[25] There is no evidence that the appellant will escape. The appellant is liable for supporting his minor children and although he has been in custody for a year and a half, no date has been set for the appeal to be heard.

[26] Due to the fact that the main consideration for the court in applications of this nature is the increased risk of the appellant absconding, such risk was not

emphasised by the respondent. The appellant is a 57 year-old man and with the necessary bail conditions, his whereabouts may be sufficiently monitored.

[27] This Court believes that the appellant has adduced evidence to support that he will not abscond. Accordingly, this Court finds that the appellant has successfully discharged the onus as contemplated in section 60 (11) (a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail pending his appeal.

[28] Accordingly, there are grounds to satisfy this Court that the decision of the court *a quo* was wrong.

ORDER

[29] In the result, the appellant's appeal is upheld.

1. Bail in the amount of R5000.00 is set.
2. The appellant may have no contact with P [....] H [....] T [....] 3
3. The appellant must report at the Booysen Police station every Friday between the hours of 06h00 and 18h00.

D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 14h00 on 10 August 2022

Date of hearing:	28 July 2022
Date of Judgment:	10 August 2022

Appearances:

On behalf of the appellant	Adv W.B Ndlovu

On behalf of the respondent	Adv T.P Mpekana