

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

30/07/2014.

BAIL APPEAL CASE NUMBER: 10/2014

In the matter of

BENNY MAHLOMOLA MANAMELA

First Appellant


THABISO GEORGE NKOSI

Second Appellant

and

THE STATE

Respondent

REPORTER OF THE COURT	
(1) VAN DELANDE VIR ANDER RECHTERS: JANE.	
(2) VAN DELANDE VIR ANDER RECHTERS: JANE.	
(3) HERSIEN.	
30/7/2014	
DATUM	HANDTEKENING

BAIL APPEAL JUDGMENT

1. The two appellants, (accused 3 and 4), and two other, (accused 1 and 2), were arrested on a charge of rape. It was alleged by the State on 23 February 2013 the four of them had forceful sexual intercourse with a female person. On 8 March 2013 they applied for bail in the Magistrate's Court, Pretoria North. They were legally represented. Their bail application was not successful, hence this appeal. The appellants are represented by Mr Leshabana. The appeal is opposed by the State, represented by Adv Mashego.

2. Section 65(4) of the Criminal Procedure Act No 51 of 1977, "CPA", provides the Court on appeal shall not set aside the magistrate's decision to refuse bail aside unless the Court is satisfied that the magistrate was wrong. What further has to be kept in mind is that the crime the appellants is charged with is a Schedule 6 offence in respect of which Section 60(11)(a) of the CPA provides that the applicant has to

adduce evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his or her release.

3. It is of importance that the magistrate was not called upon to consider and rule upon the question whether the State will be able to prove the bail applicants' guilt beyond reasonable doubt. What the magistrate was indeed obliged to consider is what the nature of the State's case was and whether it could make a finding pertaining to the strength of the State's case, if any.
4. Mr Leshabana, who appeared on behalf of the first appellant before the magistrate, appeared on behalf of both appellants in this appeal. At the inception of the arguments Mr Leshabana recorded that the other two accused succeeded with their bail appeal and that they were granted bail during the course of 2013. The reason why the two appellants are before court only now is due to financial constraints. Mr Leshabana, upon this Court's question, stated that the trial is scheduled for September 2014.
5. It was admitted by the State that the appellants and the other two had fixed addresses. All four of them lived with their parents. They, however, did not have fixed employment. Apparently they were from time to time casually employed as taxi drivers. They are not married and they do not have previous convictions.
6. In regards to the circumstances of their arrest, and concerning the strength of the State's case, the first appellant, Mr Manamela, aged 21, stated in his affidavit in support of his bail application that the night the

incident occurred, he and the other three came across the complainant and a male person who were hiking. They gave the two a lift. After a short distance the male person wanted to get off. The woman however indicated that she preferred to drive with the appellant and his friends. When the appellant talked to the woman she told him that she was a prostitute and that because she had no money, she offered to have sex with them if they would take her to Warmbaths. They agreed and the car was stopped. The first appellant was the first to have sex with her followed by the then accused 2 and the second appellant. Accused 1 did not have sex with the woman, apparently due to the fact that two cars then arrived at the scene and gunshots were fired. The four of them ran away. The next day the first appellant was informed by accused 2's uncle that accused 1 and 2 were arrested. The appellant then surrendered to the police.

7. The second appellant, Mr Nkosi, aged 22, said that the woman told them she was a prostitute and offered to have sex with the four of them *en route* to Soshanguve, in exchange for a lift. At the place where they then stopped a vehicle appeared from behind and flickered his lights. A gunshot was suddenly fired, and the second appellant ran away. The next day he heard from accused 2's uncle that accused 2 was, to his surprise, arrested for rape. He then handed himself over to the police. The second appellant did not in his statement deny or admit that he had sex with the woman. However he did state that he "*never forced or coerced the complainant*" into having sex with him.
8. The record of the bail proceedings before the magistrate reflects that the accused 1 denied that he had intercourse with the complainant. According to accused 1's statement the complainant was found at a brothel which is situated alongside the R101 road. The complainant and

a male person were seeking a lift. Accused 1 stated that he ran away due to the conduct of the police who arrived at the scene and fired shots. He stated that he was drunk, that he fell down at the side of the road and started snoring. He was then bitten by a police dog and arrested.

9. Accused 2's version comprised that he and the other three accused visited a brothel that night where they drank beer and where they stayed for 30 to 40 minutes. After they have left they encountered a woman and a man. The driver of their vehicle offered them a lift and they boarded the vehicle. Accused 2 was at that stage the driver of the vehicle. After a while the man wanted to get off but the woman stayed put. She then asked for a lift to Warmbaths and offered sex as payment because she did not have money. Accused 2 stated that it became apparent that the woman was a prostitute when she undressed herself and had sexual intercourse with another accused whilst the vehicle was in motion. They then stopped at a bridge where accused 2 also had intercourse with her. He gave the woman R50 because she said business was bad. Whilst the other accused were having intercourse with her. They heard several gunshots. He then ran away. Thereafter he heard one of his friends screaming and a voice ordering him to come out. He complied and saw a blue light.

10. The State's version of the event was cryptically recorded in a statement made by the investigating officer Sergeant Maite, as follows:

"On the 24th day of February 2013, at approximately 1h50, the victim, a 23 year old female and her friends were from the tavern and on their way home, when a blue Toyota Venture with four occupants (males) stopped and offered them a lift, and along the way her friends were

instructed to get off the vehicle, and drove off with the victim, and all four occupants of the vehicle raped her. Two of the suspects were arrested at the scene of crime, by a patrolling police vehicle, and the other two were brought in at the police station by the owner of the Venture, and the uncle of one of the suspects respectively”.

11. The magistrate, in his judgment referred to the standard provisions of the CPA concerning bail applications including the provision that in Schedule 5 offences the question of exceptional circumstances arise. The magistrate emphasizes that rape is a very serious offence, and that the crime of rape by multiple perpetrators may be visited with life imprisonment. The magistrate realised that the matter was not on trial before him but stated that the State had a *prima facie* case against the four accused. The magistrate also commented on the unlikelihood that appellants’ version that the complainant, whom they said was a prostitute, would conduct her business at the side of a road. The magistrate concluded that the appellants failed to convince him that exceptional circumstances justifying the granting of bail existed and refused bail.
12. During argument Mr Leshabana conceded that the crime of rape in the circumstances is actually a schedule 6 offence. Mr Leshabana, in his attack on the ruling of the magistrate, emphasized that the facts of the matter did not justify a finding that the State has a strong case. Mr Leshabana also criticised the magistrate’s summary of the facts, which included that the appellants said that the complainant was a prostitute.
13. After having considered the arguments of Mr Leshabana and Mr Mashego, as well as the facts before the magistrate, and the magistrate’s finding, I am not persuaded that the magistrate was wrong.

14. I have specifically recorded the respective versions of all the accused. When these versions are considered, there are clearly certain material discrepancies and inconsistencies, which I do not deem expedient to point out in detail, it suffices to say that, especially when the State's version is in perspective considered, without prejudging the matter, that I am not in agreement with Mr Leshabana that the State's case is weak.

15. In conclusion I am not satisfied that the magistrate's decision to refuse bail was wrong.

16. Accordingly I make the following order.

The appellants' appeals against the magistrate's refusal of bail are dismissed.


A J BAM JUDGE OF THE HIGH COURT
28 July 2014