REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A 281/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE: 4/2/2022

SIGNATURE:

In the matter of:

Xolile Tshofoti — Appellant

And

The State — Respondent

JUDGMENT

Maumela J.

1. This is a bail appeal which is opposed by the state. The Appellant is Xolile Tshofoti, a male who was 34 years of age at the time he was arrested. His residential address is indicated to be No [….]. Before the Regional Court for the District of Gauteng sitting at Nigel, the accused was charged with the offence of contravening the provisions of section 5(1), read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 32/2007 and read with

the provisions of Section 51 and Scheduled 2 of the Criminal Law Amendment Act 1997:(Act No 105 of 1997).

ALLEGATIONS:

2. The allegations against the accused are that upon or about the 19th of June 2021, at or near Duduza in the District of Ekurhuleni East/Regional Division of Gauteng, the accused did unlawfully and intentionally sexually violate the complainant to wit, N[….] M[….], the complainant; by having sexual intercourse with her without her consent. It is alleged that the complainant was 15 years of age at the time the offence was committed.

3. Subsequent to his arrest, before the Regional Court, held at Nigel, the Appellant unsuccessfully applied for bail on the 7th of September 2021. The Appellant granted Legal Aid South Africa the necessary Special Power of Attorney to prosecute the appeal on his behalf. On the 9th of September 2021, Appellant filed a Notice of Appeal in terms of s65 of the Criminal Procedure Act 1977: (Act number 51 of 1977) - CPA. The State did not oppose Appellant's application to be released on bail pending the outcome of the trial.

THE APPELLANT'S CASE:

4. In substantiation of his application to be admitted to bail, the Appellant stated before the court *a quo* that:
   4.1. He was born on 5 May 1987, and is 34 years of age;
   4.2. He has been residing at [….] over the past 20 years together with his wife,
   4.3. He resides there with his wife and 6 children;
   4.4. He is married with 6 dependants;
   4.5. 1626 Kubeka Street in Tsakane is his confirmed alternative address,
   4.6. He is a sole breadwinner. To support his wife and children, he does odd jobs as a taxi driver and he earns R500 per week,
   4.7. He has neither previous convictions nor pending cases,
   4.8. He applied for a permanent employment at Supreme and has been informed of success,
   4.9. He commits never to evade his trial, intimidate any of the witnesses or to commit any schedule 1 offence;
   4.10. He contends that his release will not undermine the proper functioning of the Justice System or undermine the public peace and security.

THE STATE'S CASE:

5. The State did not oppose the application brought by the Appellant to be released on bail pending the finalisation of his trial. It however placed the affidavit of the Investigating Officer; (I/O), before the Court. In it, the following was stated:
   5.1. Outcomes of the DNA investigations are still outstanding and it would take a long time to obtain the requisite report,
   5.2. The Appellant's address was verified,
   5.3. There is no likelihood that the appellant if released on bail will endanger the safety of the public and that the Appellant does not have any previous convictions,
   5.4. There is no likelihood that the Appellant will attempt to evade his trial,
   5.5. The appellant was cooperative and did not provide the I/O with false information.
   5.6. There is no likelihood that the Appellant will influence or intimidate witnesses if he is released on bail,
   5.7. That the witnesses have already made statements and
   5.8. That there is no likelihood that the released of the Appellant will undermine the proper functioning of the Criminal Justice System, including the bail system.

6. The I/O raised one issue on the basis of which he would be opposing bail and in that regard, he stated as follows: "*I am opposed to the release of bail on the applicant due to the victim's age and the fact that the victim and the accused are neighbours."* The I/O, however, indicated that he would not oppose bail if the applicant moves away from the address where he is currently residing.

7. In dismissing the applicant by the appellant to be released on bail, the Regional Magistrate held as follows: "*I am of the view that all the factors are not put before this Court in order for the Court to weigh effectively to grant the accused bail. For that reason the Court is….."*

8. The Appellant pointed out that in dismissing the application for bail, the court *a quo* based its decision on the fact that there are certain factors that were not put before court. The Appellant pointed out that in doing so, the court *a quo* disregarded the peremptory provisions of Section 60(3) of the CPA which provides the following:
   (3). *"If the court is of the opinion that it does not have reliable or*

sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the Presiding Officer shall order that such information or evidence be placed before the court."

9. It was submitted on behalf of the Appellant that the disregard of the peremptory provisions of Section 60(3) of the CPA, resulted in the Court *a quo* making an adverse finding with regard to the Applicant's release on bail. The court *a quo* noted that the Appellant got word through his wife that he must go for a job interview; yet it held that there is no proof of that.

10. The Appellant raised the point that the court *a quo* noted that it was alleged that the Appellant is a main breadwinner. It however speculated that the children received grants and that the mother and the children will be able to survive on the grants. No evidence was tendered to prove that. The State did not challenge the evidence put on record by the Appellant and did not provide any evidence contradicting his version. It was submitted that the Court erred by finding that there is no proof of the facts stated by the Applicant in his affidavit. It was argued further that by making speculative findings regarding alleged grants being received on behalf of the Applicant's children the court arrived at a wrong conclusion.

11. Regarding the admittance of accused persons to bail, section 60 (2) (b) and (c) of the CPA provides as follows:
"(2). In bail proceedings the court-
(b). may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
(c). may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

12. It was also submitted that if the court required proof of certain facts to come to a just conclusion, then it, (the court), was obliged to order the parties to place further evidence before the court. The evidence by the Appellant was not disputed by the State. Therefore, it is submitted that the court should have considered it as evidence.

APPROACH ON A BAIL APPEAL.

13. Section 65(4) of the CPA provides the following:
"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."

14. The Appellant contends that the Court *a quo* erred in refusing the Appellant's application to be released on bail. It is also submitted that from the reasons provided by the Magistrate, it is not clear why the Appellant's application for bail was refused.

15. For purposes of the bail application brought before the court *a quo* by the Appellant, section 60(11) (a) of the CPA comes relevant. This section relates to instances where the crimes alleged fall under Schedule 6 of the CPA. In that regard, the section provides as follows:
"(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;

16. From the reading of this section, the onus lies on the Appellant to place exceptional circumstances before the Court, which in the interest of justice permit his release.

INTEREST OF JUSTICE:

17. Concerning the 'interests of justice', Section 60 (4) (a)-(e) provides the following:
"(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; or

(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."

18. To determine whether the interests of Justice permit the Appellant's release on bail, section 60 (9) is peremptory. This section provides the following:

"(9). In considering the question in subsection (4), the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

(a). the period for which the accused has already been in custody since his or her arrest;

(b). the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c). the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d). any financial loss which the accused may suffer owing to his or her detention;

(e). any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f). the state of health of the accused; or

(g). any other factor which in the opinion of the court should be taken into account."

19. The Appellant submits that the judgment of the court *a quo* does not reflect that the peremptory provision under Section 60(9) was complied with.

EXCEPTIONAL CIRCUMSTANCES:

20. With regard to exceptional circumstances, the Constitutional Court in the matter of *S v Dlamini v Dladla and Others; S v Joubert; S v Schietekat*[1], held the following at paragraph 89 e-f:

"In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving

[1]. 1999 (4) SA 623 (CC).

that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case."

21. Still concerning the aspect of exceptional circumstances, the Supreme Court of Appeal in the matter of *S v Rudolph,* at page 266 h-I, held the following: *"Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4) - (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified."* In the case of *S v DV and Others*[2]*,* the Court held the following at paragraph 8: *"In the context of s 60 (11) (a), the exceptionality of the circumstances must be such as to persuade a court that it would be in the interest of justice to order the release of the person of the accused. A certain measure of flexibility in the judicial approach to the question is required."*

22. The Appellant stated in his affidavit that with regard to the interest of justice, and more in particular the factors as enumerated in Section 60(4)(a)-(e), none among the factors listed come attendant to his situation and therefore, he deserves to be admitted bail. The Investigating Officer also confirmed that.

23. In the case of *S v Branco*[3] the court held the following at p. 532 H-I: *"The fact that the appellant bears the onus does not mean that the State can adopt a passive role by not adducing any or sufficient rebutting evidence in the hope that the appellant might not discharge the onus. (See S v Jonas[4] ; S v Mauk[5]).* The appellant points out that the state did not advance any evidence to rebut his contention the that he proved before court that considering all circumstances, he stands entitled to be admitted to bail.

24. The only reasons advanced by the Investigating Officer towards opposition to the admittance of the appellant to bail as to do with the age of the complainant and the fact that he in the complainant are neighbours. However, there is no evidence showing that any of the factors as listed under Section 60 (4) (a)-(e) may materialise. In the case of *S v Diale and Another*[6], at paragraph 14, the honourable Kbushi J stated that: *"A court cannot find that the refusal of*

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[2]. 2012 (2) SACR 492(GNP).
[3]. 2002 (1) SACR 531 (W)
[4]. 1998 (2) SACR 677 (SE).
[5]. 1999 (2) SACR 479 (WLD) at 484B-C.
[6]. 2013 (2) SACR 85 (GNP).

bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60 (4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released.'

OBJECTIVE OF BAIL:

25. In the cases of *S v Dlamini v Dladla and Others; S v Joubert; S v Schietekat*[7], the Constitutional Court held that the basic objective traditionally ascribed to the institution of bail is to maximise personal liberty. In the case of *Senwedi v S*[8]*,* the Constitutional Court recently held the following at paragraph 27 with regard to a persons' right to freedom*: "Our Courts must defend and uphold the Constitution and the rights entrenched in it. One of the most important rights, from a historical perspective, is unquestionably the deprivation of an individual's liberty. This Court said in Ferreira that "[c]conceptually, individual freedom is a core right in the panoply of human rights". The apartheid regime repulsively and capriciously deprived people of their freedom under illegitimate legislation that paid no respect to the rights to freedom and security of the person. We are therefore constrained to jealously guard the liberty of a person under our Constitution, particularly in terms of section 12 of the Bill of Rights."*

26. In S v Branco[9] at 537 a-b, the Court held the following: *"Finally, a court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion."*

27. In the case of *S v DV and Others*[10]**,** Legodi J held the following at paragraph 54: *"Bail conditions have always served to ensure that whatever fears the state might have in the release of an accused person are taken care of. It is a necessary consideration, as also envisaged in s 60 (6), which provides that, in considering whether the ground in ss (4) (b) has been established, the court may, where applicable, take into account the binding effect and enforceability of bail conditions which may be imposed, and the ease with which such conditions*

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[7]. 1999 (4) SA 623 (CC).
[8]. (CCT 225/20) [2021] ZACC 12 (21 May 2021).
[9]. 2002(1) SACR 531 (W)
[10]. 2012 (2) SACR 492(GNP).

could be breached."

28. The complainant in this case was 15 years of age when they offense was allegedly committed. The allegations are that the Appellant subject to her to sexual assault. The Appellant disputes the allegations made against him. The Appellant and the complainant our neighbours. It is alleged that after the commission of the alleged offence, the Appellant summoned the complainant to his place of residence whereupon he threatened her, telling her not to divulge the alleged sexual offense to anyone.

29. It is trite that undesirable act or eventualities which bail applicants are likely to cause may be circumvented by way of building conditions into the bail granted. See *S v Branco*[11]*.* It is therefore undesirable to keep the Appellant incarcerated and to undermine his constitutional right to freedom in order to prevent him from committing crimes against members of the public or indeed the complainant in this case. The Investigating Officer is perfectly positioned to access the correctness or otherwise of admitting the Appellant to bail.

30. Such a person would therefore have 'sounded a bell' against the admittance of the Appellant to bail. The fact that he decided not to do so points to a lack of convincing evidence pointing to wrongness in admitting the Appellant to bail.

31. The Appellant placed evidence before the Court which was not disputed by the State. The State chose not oppose the Appellant's bail application. That being the case, his evidence stands where there is no opposing evidence from the state disproving the evidence he gave. That evidence was confirmed by the Investigating Officer.

32. That being the case the court finds that exceptional circumstances are attendant to the Appellant which warrant his release on bail. The court finds further that the decision by the magistrate refusing the Appellant's application to be admitted to bail cannot be sustained by the facts proven in the case. The second decision was therefore incorrect and it stands to be set aside.

[11]. Supra.

33. Consequently, the Appellant's appeal against the refusal of his application for admittance to bail made by the Magistrate is set aside and the following order is made:

ORDER.

33.1. The bail appeal of the appellant is upheld.

33.2. The order of 7 September 2021 by the Regional Magistrate, dismissing the appellant's bail application, is set aside and substituted with the following order:

33.2.1. Bail is granted in the amount of R 500 (five hundred Rand), on the following conditions:

33.2.1.1. That the appellant shall attend all Court appearances until the finalisation of the trial and

33.2.1.2. That the appellant shall not contact, communicate, interfere or intimidate any of the state witnesses;

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T.A. Maumela.
Judge of the High Court of South Africa.