Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

Case Number: A128/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

21/11/2022

DATE SIGNATURE

In the matter between:

N H Appellant

and

THE STATE Respondent

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an appeal against the refusal of bail pending petition to the Judge President of this Division, by Regional Magistrate Ms Mlaba, sitting in the Palm Ridge Court, on 11 February 2022.

[2] The appellant was charged with: count 1, kidnapping; count 2, contravening of section 17 of the Domestic Violence Act 116 of 1998; count 3, attempted murder; count 4, contravening section 3 of the Sexual Offences and Related Matters Amendment Act 105 of 1997, rape; and count 5, intimidation.

[3] The appellant pleaded not guilty to all the charges preferred against him. On 30 August 2021 he was convicted of count 1, kidnapping; count 2; contravening of section 17 of the Domestic Violence Act; and count 4, contravening section 3 of the Sexual Offences and Related Matters Amendment Act, rape. He was acquitted on count 3, attempted murder; and count 5, intimidation.

[4] The appellant was sentenced as follows:

(a) Count 1: Kidnapping - 2 years imprisonment;

(b) Count 2: Contravening of section 17 of the Domestic Violence Act - 5 years imprisonment; and

(c) Count 4: Contravening section 3 of the Sexual Offences and Related Matters Amendment Act, rape - 10 years imprisonment.

[5] In terms of section 280 of the Criminal Procedure Act 51 of 1977 ("the CPA") the court *a quo* ordered that the terms of imprisonment imposed on count 1 and 2 would run concurrently with the term of imprisonment imposed on count 4.

[6] On 11 February 2022, the appellant applied for leave to appeal, which application was refused by the court *a quo.*

[7] Following the refusal for leave to appeal by the court *a quo* the appellant applied in terms of section 309C(2)(iii) of the CPA for special leave to appeal to the Judge President of this Division.

[8] Furthermore, the appellant also applied for his release on bail pending the outcome of the petition to the Judge President of this Court. The application for his release on bail pending the outcome of his petition was refused by the court *a quo.*

[9] Aggrieved by the decision, the appellant appealed to this Court against the refusal of bail pending petition.

[10] On 3 November 2022 the petition was considered by myself and Jordaan AJ in terms of section 309C(5)(a) of the CPA and the appellant was granted leave to appeal to the High Court of this Division.

Background

[11] The appellant was arrested on 21 November 2019. He was released on bail on 11 December 2012 on an amount of R1000.00. He remained out on bail until his conviction on 30 August 2021. The bail was then revoked. The appellant was sentenced on 26 October 2021.

[12] The appellant's affidavit for purposes of the application for bail pending petition contained the following averments, namely:

(a) He was born on 23 June 1985 and is 37 years old.
(b) He does not possess a passport or any family residing outside the borders of South Africa.
(c) Prior to his incarceration he was residing at Vosloorus G1/1 Nguni Hostel, Block D Corner house.
(d) He is married to Ms Ntenjiwe Buthulezi.
(e) He is the father of 5 minor children born from different relationships. He also supports his 2 step children.
(f) His elderly father residing in Limpopo Province, is dependent on him for financial support.
(g) His wife is unemployed.
(h) He is the sole breadwinner.
(i) Prior to his conviction he was employed at SKS Business Solutions, as an electrician and earned R12 000 per month. If released on bail, he will approach

his former employer to reinstate his employment. There is a good prospect that he will be reinstated.

(j) During the trial, he adhered to all conditions which formed part of his release on bail and submits that the lengthy period he spent on bail without contravention during the trial should be considered in his favour.

(k) Save for the present matter, he has no previous convictions or any pending cases against him.

(l) He has an amount of R3000 available for bail and he would report to the Vosloorus Police Station if such conditions were to be imposed by the Court.

[13] The prosecutor in the court *a quo* argued that the appellant was convicted of a schedule 6 offence and therefore, he has to show exceptional circumstances that warrants his release on bail. The state was of the view that his release would not be in the interests of justice, and the prospects of success on appeal were slim.

[14] The appellant's counsel contended that the court *a quo* misdirected itself in failing to find the following;

(a) The inability of the state to provide the transcripts of the trial to the appellant without delay, is an infringement of the appellant's right to a fair trial which encompasses his right to appeal and therefore constitutes new facts warranting a finding that exceptional circumstances exist, which in the interest of justice warrant the release of the appellant on bail pending the outcome of his petition.

(b) The contents of the affidavit by Mr Frans Tala, the Clerk of the Regional Court, to the effect that the transcribers had been unable to access the Justice Department's portal system to retrieve the transcripts, since 18 October 2021, is an exceptional circumstance that amounts to a new fact, which in the interests of justice justifies the release of the appellant on bail pending petition.

(c) Alternatively, that there exists a possibility that the transcripts may never be retrievable from the portal system and this may lead to unreasonable delays, which may be prejudicial to the prosecution of the appellant's appeal in this Court.

(d) The appellant is not a flight risk and the respondent did not present any evidence in opposing the appellant's application to be released on bail pending petition. Furthermore, prior to conviction, the appellant was out on bail and he attended the court proceedings conscientiously until he was convicted and his bail was revoked.

(e) To exercise its discretion judiciously to consider all relevant factors to determine whether individually and cumulatively warrants a finding that circumstances of an exceptional nature exist which justify the release of the appellant on bail pending petition.

[15] Counsel for the appellant argued that the appellant is not a flight risk, he has a fixed address, his employers presented a letter to the effect that they are prepared to reinstate his employment. Furthermore, the challenges in locating the transcripts of the trial may lead into the entire proceedings being set aside. The prejudice to the appellant, due to the inability to reconstruct the trial record, could be mitigated by releasing the appellant on bail pending petition. It was argued that in considering all factors that there are reasonable prospects of success on appeal.

Legal Principles

[16] Section 65 (1) of the CPA provides that:

"(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting."

[17] When deciding on the matter before me, I am alive to the provision in terms of Section 65(4) of the CPA which states 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."

[18] The provision above was considered and interpreted by Hefer J in *S v Barber*,[1] where he held:

> "It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

[19] In *S v Porthen and Others*,[2] Bins-Ward AJ (as he then was) focused on the appeal court's right to interfere with the discretion of the court of first instance in refusing bail when he held:

> "When a discretion… is exercised by the court *a quo*, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong…."

[20] In *S v Bruintjies*,[3] the Supreme Court of Appeal dealt with a similar case, where the applicant was convicted and sentenced on counts within the ambit of section 60(11) of the CPA. The Supreme Court of Appeal found as follows;

> "The section deals, on the face of it, with unconvicted persons. However, it must follow that a person who has been found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test. It was conceded that the mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of the sentence, nor does it entitle him to bail as of right. (See *R v Mthembu* 1961 (3) SA 468 (D))."

[21] In the case of *Bruintjies supra* the court found that the appellants bore the onus to persuade the court that exceptional circumstances exist, which, in the interests of justice, permit their release on bail. Thus, exceptional circumstances will have to be shown before a person convicted of schedule 6 offences and sentenced to long term

[1] 1979 (4) SA 218 (D) at 220 E-F.
[2] 2004 (2) SACR 242 (C) at para 11.
[3] *S v Bruintjies* 2003 (2) SACR 575 (SCA) at para [5].

imprisonment is released on bail pending an appeal. Despite the wide discretion provided for in section 321, a starting point should be that exceptional circumstances will have to be shown to exist before bail can be granted as this effectively suspends the sentence of the applicant until his appeal is dealt with.

[22] Section 60(4) of the CPA provides that:

"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;

(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;

(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;

(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 circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security".

[23] In applying the provisions of section 65(4) of the CPA, the court hearing the bail appeal must approach it on the assumption that the decision of the court *a quo* is correct and not interfere with the decision, unless it is satisfied that it is wrong.[4]

Evaluation

[24] The appellant's first hurdle is that he now bears an evidential burden of showing that exceptional circumstances exist for him to be released on bail, pending the outcome of the appeal. The next difficulty for the applicant is his changed status - he was convicted and as such, the presumption of innocence no longer operates in his favour. I

[4] *S v Mbele & Another* 1996 (1) SACR 212 (W) at 221H-I, The appeal court will interfere if the magistrate overlooked some important aspects of the case or unnecessarily overemphasized others, in considering and dealing with the matter – See *S v Mpulampula* 2007 (2) SACR 133 (E); *State v Essop* 2018 (1) SACR 99 (GP) at para [23].

have to consider that at this stage, there exists an increased risk of abscondment, because the appellant was sentenced to long term imprisonment.

[25] Prospects of success on appeal do play a role in determining whether or not bail ought to have been granted. It is common cause that leave to appeal was granted on petition. This fact on its own does not constitute sufficient ground for granting bail pending appeal However, granting leave to appeal may be based on the consideration that the sentences to be imposed, or part thereof, ought to run concurrently. It is evident, that in granting leave to appeal, the court formed the view that the appellant has reasonable chances of success on appeal.

[26] Although leave to appeal was granted because prospects of success were reasonable on appeal, it remains necessary for me to consider the current facts and context of the matter. Furthermore, this is not a mechanical application of law, because, notwithstanding the fact that the appellant faces a formidable prospect that he was wrongly convicted, this is but one of the factors I have to consider, in finding whether exceptional circumstances exist for him to be released on bail.

[27] This Court cannot lose sight of the fact that the respondent is opposing this appeal.

[28] I must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that exceptional circumstances exist to warrant the appellant's release on bail. Of importance in this regard, are the provisions of section 60 (4) to (9) of the CPA. These provisions will be considered against the background of the appellant's adherence to his bail conditions during the trial, the prospect of reinstatement of his employment, and the appellant having no previous convictions.

[29] As already referred to above, it was argued on behalf of the appellant that there is a high likelihood that his convictions will be overturned. Various arguments were raised in this regard, which is unnecessary to discuss for purposes of this application, these arguments will be fully ventilated during the appeal. As stated in *S v Viljoen*,[5] if I consider the merits of the appeal now, it would become a dress rehearsal for the appeal

[5] 2002 (2) SACR 550 (SCA) at 561 G-I.

to follow. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.

[30] Rape is a Schedule 6 office. In the premises, the appellant must show, by adducing evidence, that exceptional circumstances exist which, in the interests of justice, permits his release on bail. In *S v Petersen*[6] it was stated that:

> "...[I]t is clear that the onus is on the accused to adduce evidence, and hence to prove, to the satisfaction of the court the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice".

[31] In paragraphs [55] and [56] the concept of "exceptional circumstances" was explained as follows:

> "… Generally speaking, 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, different degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.
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> In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

[32] The mere fact that the appellant was found guilty of a charge in respect of a schedule 6 office is not an absolute bar to the granting of bail, and that refusing bail is not punitive in character. That much is clear from a proper interpretation of the relevant provisions of the CPA. There are, however, various factors that militate against the granting of bail in the present matter.

[33] Firstly, the appellant had legal representation at the time of the bail hearing. It is indisputable that on the day of the incident, the appellant visited the complainant, and this was in contravention of section 17 of the DVA. Prior to the incident, the complainant was known to the appellant as they were involved in a relationship. After

[6] 2008 (2) SACR 355 (C) at para [54].

termination of the relationship, the complainant approached the domestic violence court and applied for an interdict to prevent the appellant from threatening or assaulting her. The interdict was granted; however, the appellant did not adhere to the court order. I cannot ignore the real risk of him approaching the complainant and endangering her safety if he is released on bail.

[34] Secondly, the appellant did not provide any evidence in support for his conclusion, in his affidavit delivered in support of his bail application, that it would be "in the interests of justice" that he be released on bail. He set out his personal details in a generic manner in an affidavit, and did not give oral evidence under oath in elaboration. He has, in short, not placed any evidence on record which can be relied upon to prove the existence of exceptional circumstances. I have already referred to his submissions in support of bail and reiterate they do not amount to exceptional circumstances.

[35] Thirdly, I have to consider the views of the community relating to the seriousness of the offences of which the appellant has been convicted of. In *Carmichele v Minister of Safety and Security and Another*[7] the following was stated:

> "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women."

[36] In *S v Chapman*[8] the Supreme Court of Appeal said the following*:*

> "The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

[37] The prevalence of violence against women in South Africa reveals that the country is plagued by the horror of gender-based violence ("GBV"). GBV is both a human rights and a public health issue, which not only affects the individual, but has an impact on families and communities both in the short and long term. Women exposed to GBV often suffer from severe and long-lasting health issues, including, fatal outcomes, acute

[7] 2002 (1) SA 79 (CC) at para [62].
[8] [1997] ZASCA 45.

and chronic physical injuries and disabilities, serious mental health and behavioural problems, which all impact negatively on the public health sector.

[38] The impact of GBV on the public health system was addressed by a former American Surgeon General, Dr Everett-Koop, where he stated that violence is a major public health issue for all Americans. I quote, " [It has] a clear and measurable impact on the physical and mental health of all our citizens. And every day, it also has a major impact upon our clinics, our hospital emergency rooms, and all of our health care facilities. Whilst the burden on our public resources such as hospitals, clinics and police services are self-evident, the internal psychological consequences such as post-traumatic stress, depression, permanent mental scarring and suicide come at great personal cost to the victim."[9]

[39] South African researchers have made the following comments:[10]

> Following rape, many women experience long-lasting health impacts including direct and indirect psychological and physical morbidities. Psychological impacts include posttraumatic stress disorder (PTSD) and other anxiety disorders, depression, and suicidality. In South Africa, the risk of mental health problems has been found to be higher among women with histories of rape compared to women with other trauma experiences. Much less is known about the physical health consequences of rape" [footnotes omitted].

[40] It is of the utmost importance that South Africans must approach the impact of GBV on the victim and the public health sector with great concern.

[41] It is important to take into consideration the complexity of GBV in an intimate relationship, as it mainly takes place behind closed doors. If the appellant is granted bail, such would fume the perception of community members that there is no justice for victims of GBV. Therefore, the release of the appellant on bail will undermine and jeopardise the public confidence in the criminal justice system. These factors must be carefully balanced with the personal circumstances proffered by the appellant.

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[9] Schafran LH. *Rape is a major public health issue*. Am J Public Health. 1996 Jan 86(1):15-7.

[10] Abrahams, Naeemah, et al. "*Rape survivors in South Africa: analysis of the baseline socio-demographic and health characteristics of a rape cohort*." Global health action 13.1 (2020): 1834769.

[42] Fourthly, the point raised by Mr Hlatshwayo as to the prejudice suffered by the appellant due to the transcripts of the trial record being incomplete, in my view, was not an insuperable hurdle as stated and was unpersuasive.

[43] I have to mention that record of the trial proceedings is incomplete in regard to the sentence proceedings. In *Nhlapho v S*, Sardiwalla J, referring to *S v Banyane; S v Moila*,[11] remarked:[12]

> "…[W]ith reference to the Rules of the Magistrates' Courts that Rule 67 placed an obligation upon the Clerk of the Court to prepare a transcript of the record where an appeal was noted and that the clerk was not absolved of that obligation, even where the appeal was noted out of time. Accordingly, in my view the primary responsibility for preparing and providing a complete and satisfactory criminal appeal record for use by this Court, lies with the Clerk of the Court where the appeal originates".

[44] In *S v Gora and Another*[13] it was stated:

> "Where the record of a criminal trial has been lost and has to be reconstructed, the reconstruction process is part and parcel of the fair trial process and includes the following elements: the accused must be informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his rights to participate in the reconstruction process…. Once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record; arrange a date for the parties to reassemble, in an open court, in order to jointly undertake the proposed reconstruction…".

[45] Counsel for the appellant conceded that the presiding officer, Ms Mlaba was not approached in order to reconstruct the record and he indicated that due process will be followed in this regard.

[46] In *S v Chabedi*,[14] the Supreme Court of Appeal said;

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[11] 1999 (1) SACR 622 (W).
[12] [2018] ZAGPPHC 880 at para [12].
[13] 2010 (1) SACR 159 (WCC) at 160B-E.
[14] 2005 (1) SACR 415 (SCA) at para [5].

"On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible."

[47] Therefore, I am of the view that the appeal can proceed without delay and the incomplete record of the trial proceedings is not an exceptional circumstance for the appellant to be released on bail pending appeal.

[48] Lastly, at this stage of the proceedings, namely on appeal against the refusal of bail, the question is not whether the new facts averred by the appellant are sufficient to upset the refusal of bail by the court *a quo*, but whether, taken together with the all existing facts, they constitute sufficiently exceptional circumstances as to satisfy this Court, in terms of section 60(11)(a) of the CPA, that the appellant should, in the interests of justice, be released on bail.

[49] On consideration of the matter as a whole, I am not satisfied that the Regional Court Magistrate, Ms Mlaba, misdirected herself on the legal principles involved, or on the facts in this matter. The evidence on record, viewed as a whole, shows that the appellant failed, at the bail hearing, to discharge the onus of proving that exceptional circumstances exist, justifying his release on bail in the interests of justice. He simply did not adduce evidence that could persuade a court that it would be in the interests of justice to release him on bail.

[50] In the result, I make the following order:

1.The appeal is dismissed.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 November 2022.

DATE OF HEARING: **18 November 2022**

DATE JUDGMENT DELIVERED: **21 November 2022**

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