Appeal no 309/02

In the matter between

BRUCE EHRLICH
APPELLANT

and

THE STATE ***RESPONDENT***

Coram : SCOTT, STREICHER et CONRADIE JJA
Heard : 21 AUGUST 2002
Delivered : 13 SEPTEMBER 2002

Bail appeal – appellant facing charges of indecent assault involving boys – bail previously cancelled for breach of bail conditions – appeal without merit

J U D G M E N T

SCOTT JA/...

***SCOTT JA*:**

[1] This is an appeal against the refusal to grant bail. The appellant is currently on trial in the Regional Court, East London, where he faces 14 counts of indecent assault involving minor boys. He is not a first offender. He was convicted of the same offence in 1991. By reason of the previous conviction, the offences with which he is now charged fall within the ambit of Schedule 6 of the Criminal Procedure Act 51 of 1977 ('the Act'). This being so, the appellant was obliged in terms of s 60 (11) (a) of the Act to establish on a balance of probabilities the existence of exceptional circumstances which in the interests of justice permitted his release on bail. (The section has survived the scrutiny of the Constitutional Court. See *S v Dlamini* 1999 (4) SA 623 (CC) at 661 D *et seq*.) Surprisingly, no mention is made of s 60 (11) (a) and its effect on the application in the judgment of the magistrate refusing bail or in the judgment of the Court *a quo* dismissing the appeal. In the event, it is of little consequence. Even applying the ordinary principles applicable to bail applications as set out in ss 60 (4) to 60 (9) of the Act I am satisfied that bail was correctly refused. Indeed, I have difficulty in

appreciating why leave to appeal was granted at all, let alone to this Court.

[2] The matter has a long history. The appellant was arrested in March 2000. He applied for bail, but it was refused. He applied again on 5 May 2000. This time he was successful mainly, it would seem, because it was anticipated that the trial would only commence in September of that year. The conditions of bail were stringent. One of them was that the appellant was not to be in the company of anyone under the age of 18 years. Thereafter, on three occasions, *viz* 9 June 2000, 21 September 2000 and 15 November 2000, he applied unsuccessfully to have the bail conditions amended. He appealed against the refusal on the last occasion but the appeal was dismissed on 19 December 2000. This did not deter him. He ignored the condition in question and on 14 May 2001 his bail was cancelled in terms of s 66 (1) of the
Act. He appealed but the appeal was dismissed.

[3] On 7 June 2001 the appellant again applied for bail. It was refused. Further applications for bail followed on 30 August, 25 September 2001 and on 21 February 2002. All were refused. The present appeal is a sequel to the refusal of bail on 21 February 2002.

[4] In the meantime, the trial finally commenced in September 2001. There were various reasons for the delay. In 1996 the appellant had been charged in the Knysna Regional Court on a number of counts involving alleged offences of a similar nature to those he presently faces. During the course of the trial one of the assessors withdrew and the proceedings were set aside on review by the Cape High Court. One of these counts related to an offence allegedly committed in the Eastern Cape. This count was added to those the appellant presently faces, but it all took time. Once the trial commenced, it appears that progress was slow. Not only was there a heavy court roll to contend with but much time was lost while the appellant consulted with his legal aid attorney after each witness completed his evidence-in-chief. The appellant also brought three separate applications for the presiding magistrate to recuse himself. All were refused. The last was heard on 14 December 2001. The appellant appealed but without success.

[5] While out on bail the appellant was given legal aid. The appellant was highly critical of the attorney appointed to act on his behalf and following the application to have the appellant's bail withdrawn the attorney applied for and was granted leave to withdraw. Another attorney was appointed by the legal aid board. He too was criticized by the appellant and after he had been relieved of his mandate he withdrew in February 2002 shortly before the bail application on 21 February 2002. By this time the trial had taken up some 20 court days. Eighteen witnesses had given evidence, including the complainants in seven of the 14 counts.

[6] The appellant was unrepresented at the hearing on 21 February 2002. At the time he was embroiled in a dispute with the legal aid board which apparently was reluctant to afford him further legal aid in the light of what had gone before. In addition, he wanted to be represented by an advocate, not an attorney. One of the grounds he advanced at the bail hearing was that by reason of his detention in prison and inability to generate funds he was unable to procure legal representation which he required not only for the trial but also for two applications he wished to bring before the High Court, one being for a stay of the criminal proceedings on the ground of unreasonable delay, the other to review the decision of the legal aid board.

[7] It was on the strength of this ground that the Court *a quo* granted the appellant leave to appeal. Indeed, despite the appellant's assertions to the contrary, there were in reality no other new facts distinguishing the application from the previous one. (I mention in passing that we were informed by counsel that the appellant has in the meantime been afforded further legal aid and that the trial has progressed to the stage where the State has closed its case.)

[8] The dilemma in which the appellant temporarily found himself, *viz* without legal representation and deprived by reason of his imprisonment of the ability to earn money to pay for such representation, is no doubt a factor which in appropriate circumstances may be taken into account when determining the issue of bail. But it goes without saying that it is a factor which must be weighed in the light of other relevant considerations. The appellant was largely instrumental in the withdrawal of his second attorney. The predicament in which he found himself was therefore at least partly his own doing. But quite apart from the circumstances in which the attorney came to withdraw there are other factors which weigh heavily against the granting of bail. As previously mentioned, the appellant has a previous conviction for a similar offence. On that occasion he pleaded guilty. Professor Edwards of Rhodes University was called to give evidence in mitigation. On the basis of his clinical examination of the appellant he diagnosed him as being a regressive paedophile. The appellant denies the correctness of Professor Edwards's diagnosis and denies that he was guilty of the charge to which he pleaded guilty. He now insists that he pleaded guilty as a result of poor legal advice. His evidence in this regard is hardly persuasive. Following his plea of guilty, he was sentenced to imprisonment which was suspended conditionally. One of the conditions was a prohibition against making contact with under-age boys. As a result of a breach of this condition the sentence was put into operation and the appellant was sent to prison. This notwithstanding, he breached a similar condition while out on bail pending the commencement of the trial in the present case. As in the case of the previous breach the appellant sought to justify his conduct, but the

excuse is unconvincing. The point is that he breached a condition of his suspended sentence with full knowledge of the consequences. This landed him in prison. While out on bail in the present case he sought, but failed, to have the condition removed. He even took the magistrate's refusal on appeal. Once again he breached the condition. As the Court *a quo* correctly observed, the appellant has shown himself to be unworthy of being trusted.

[9] Even applying the ordinary principles applicable in applications for bail, I can see no basis for interfering with the decision of the magistrate to refuse bail in the exercise of his discretion. In the present case, as I have said, the appellant was obliged in terms of s 60 (11) (a) of the Act to establish the existence of exceptional circumstances which in the interests of justice permitted his release on bail. He quite clearly failed to do so.

[10] The appeal is dismissed.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

STREICHER JA
CONRADIE JA