

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A 395/2018

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

Date: 2/6/2020 Signature: *[Handwritten Signature]*

In the matter between:

RAATHS WILLEM ABRAM

APPLICANT

and

THE STATE

RESPONDENT

JUDGMENT

Van der Schyff, J.

Introduction

- [1] This bail application is considered during the National State of Disaster declared by the State President in terms of the Disaster Management Act, No 57 of 2002 and the ensuing extended covid-19 national lockdown. On request of, and by agreement between the parties, the application is considered on paper and without oral

argument. After receipt of both parties' heads of argument, applicant's counsel was afforded the opportunity to file supplementary heads of argument in reply to the state's heads of argument. The court was notified that no supplementary heads of argument would be filed.

- [2] When the application was considered, it became apparent that the respondent had not yet filed an application for special leave to appeal (petition) at the Supreme Court of Appeal (the SCA). The parties were requested by this court to file supplementary written argument whether this court has the jurisdiction to hear a bail application, where the process to appeal the judgment has not commenced. The court was then requested to stand the application down until 1 June 2020 to allow the applicant to file the necessary confirmation that a petition was filed at the SCA. As a result, the documents under consideration are the bail application supported by the founding affidavit of the applicant and the parties' respective heads of argument.
- [3] The application is brought in terms of section 309(5) of the Criminal Procedure Act, No. 51 of 1977, hereafter the CPA. This section determines that "where a provincial or local division of the Supreme Court gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, such division of the Supreme Court has the powers in respect of the granting of bail which a magistrate's court has in terms of section 307." When read in the context of section 309(5), section 307(1) stipulates, amongst other, that the execution of a sentence shall not be suspended when the convicted person appeals the judgment, unless the court, which imposed the sentences, releases the convicted person on bail. This corresponds with section 321 of the CPA where it is prescribed that the execution of the sentence of a Superior Court shall not be suspended by reason of any appeal against a conviction, unless the Superior Court from which the appeal is made, deems it is fit that the accused be released on bail, or treated as an unconvicted prisoner until the appeal has been heard and decided.
- [4] The applicant before the court was convicted on 6 September 2016 on four counts of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007 (counts 1, 2, 7, and 8) and a contravention of section

5(1) of the same Act (counts 3 and 9). On 17 November 2017 he was sentenced to four (4) periods of life imprisonment (counts 1, 2, 7 and 8), as well as two ten year periods of imprisonment (counts 3 and 9). On appeal the convictions on counts 1, 2 and 3 were set aside and replaced with convictions on common law rape, and indecent assault, respectively. The appellant's convictions on counts 7, 8 and 9 were upheld. The appeal against the sentences was dismissed.

Applicable legal principles

- [5] The applicant was convicted, *inter alia*, of the rape of a person under the age of 16 years. This offence is a Schedule 6 -offence and as a result, section 60(11)(a) of the CPA applies. Consequently, the onus is on the applicant to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release on bail.
- [6] It is trite that the determination as to whether exceptional circumstances exist must be done on a case-by-case context specific basis. Two factors that are central in this determination, is the applicant's prospects of success in the appeal, and whether he poses a flight risk. These factors do not in themselves constitute or amount to exceptional circumstances. They must be considered individually and cumulatively with all the relevant factors when a court determines whether the relevant factors constitute exceptional circumstances which would justify an applicant's release on bail – *S v Bruintjies* 2003 (2) SACR 575 (SCA).

The parties' respective submissions

- [7] The applicant surmises that he has reasonable prospects of success on appeal. The applicant contends that this court erred on material aspects and that a court on appeal will come to different conclusions and interfere with the findings of this court in respect of the convictions and sentences imposed. The applicant lists a number of personal factors in support of the contention that he is not a flight risk.
- [8] The respondent submits that in the content of his founding affidavit, the applicant falls short of indicating a reasonable chance of success on appeal. The respondent

correctly points out that the founding affidavit is to a great extent a summary of the heads of argument in the appeal of the applicant that served before this court. The respondent submits further that the reality that the applicant has nearly exhausted all avenues to stay out of jail is a pre-eminent reason to abscond.

Analysis

- [9] The applicant must apply for special leave to appeal against the judgment of this court, and this process was initiated with the filing of the aforementioned petition with the Supreme Court of Appeal. We are therefore conscious of the fact that we are not sitting as a court of appeal on our own judgment when this bail application is considered. However, in determining the applicant's prospects of success on appeal, this court has to reflect on its judgment, and the criticism directed against it by the applicant in order to determine whether the appeal would have a reasonable prospect of success.
- [10] Since the grounds for appeal as contained in the founding affidavit corresponds to a great extent with the grounds of appeal raised against judgment of the regional magistrate, it will only be addressed cursorily:
- i. **Ad The complainant as a competent witness:** This aspect was addressed comprehensively in the judgment dated 30 April 2020 and after reconsideration we are not convinced, nor satisfied, that another court would come to a different finding;
 - ii. **Ad The complainant as a credible witness:** This aspect was addressed comprehensively in the judgment dated 30 April 2020 and after reconsideration we are not convinced, nor satisfied, that another court would come to a different finding;
 - iii. **Erroneous factual findings:** This aspect was addressed comprehensively in the judgment dated 30 April 2020 and after reconsideration we are not convinced, nor satisfied, that another court would come to a different finding;
 - iv. **The applicant's version:** This aspect was addressed comprehensively in the judgment dated 30 April 2020 and after reconsideration we are not convinced, nor satisfied, that another court will come to a different finding;

- v. **Ad Sentence:** We dealt with the applicant's submission that substantial and compelling circumstances exist which justified the imposition of lesser sentences than the prescribed sentences where it is applicable and rejected that argument. After reconsideration we are not convinced, nor satisfied, that another court would come to a different finding in this regard. In light of the gravity of the offences of which the applicant were convicted, we agree with the respondent's submission that, even if the Supreme Court of Appeal finds that the periods of life imprisonment are inappropriate in the circumstances, the applicant still faces a substantial period in jail and in this context, any prospect of success that might exist, will not result in a non-custodial sentence being imposed. Subsequently, it does not tilt the scales in favour of granting bail.

[11] Other relevant factors raised by the applicant and considered by the court:

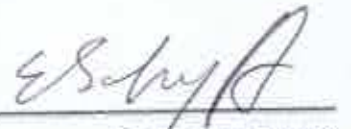
- i. The applicant was on bail for a substantial period during his trial, and thereafter, and complied strictly with his bail conditions;
- ii. His passport is already handed in to the South African Police Services. He does not have friends or family abroad. He does not pose a flight risk, a fact acknowledged in previous bail applications brought in this Division in relation to this case;
- iii. The applicant reported at the Correctional Services in Pretoria to commence the serving of his sentence on 15 May 2020;
- iv. The applicant is 45 years old and a first offender. He is married and has stable work and home circumstances. He states that his employer knows of his situation and is prepared to keep him in employment if bail is granted;
- v. He established his own business and is eager to make a success thereof;
- vi. He does not have access to minor children, or the complainant, and presented expert evidence during the trial that he does not suffer from any personality dysfunction or paedophilic disorder;
- vii. He is prepared to comply with extremely strict bail conditions, including reporting on a daily basis to Wierdabrug Police Station where he reported for the last six years

- [12] The applicant's prior conduct when granted bail and his personal circumstances are indicative of the fact that this court can readily accept that he will not abscond if granted bail. This being said, this court is not convinced, nor satisfied, that the applicant has any prospect of success on appeal. The seriousness of the crimes of raping and sexually violating his own daughter when she was of an extremely tender age, and the real prospect of a lengthy custodial sentence therefor, are unassailable. In circumstances where leave to appeal has not yet been obtained, the latter factors lend weight to a decision not to grant bail at this point in the process.

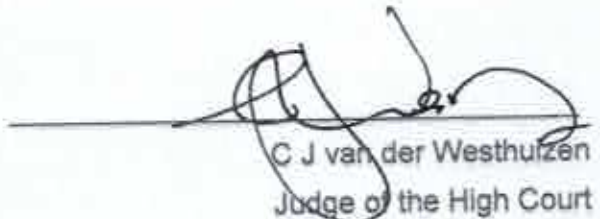
ORDER

In the result I propose the following order:

1. The applicant's application in terms of section 309(5) of the Criminal Procedure Act, No. 51 of 1977, to be released on bail pending application for special leave to appeal to the Supreme Court of Appeal, is dismissed.


 E van der Schyff
 Judge of the High Court

I agree, and it is so ordered.


 C J van der Westhuizen
 Judge of the High Court

Counsel for the appellant:
 Instructed by:
 Counsel for the respondent:
 Instructed by:
 Date on the roll:
 Delivered:

Adv S vd W Schnetler
 Neuhoff Attorneys
 Adv P C B Luyt
 Director of Public Prosecutions
 1 June 2020
 2 June 2020