THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: A 670/02

In the matter between

ALLAN SIDNEY KOCK **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **HOWIE P, HEHER and SHONGWE AJJA**

Heard: **14 January 2003**

Delivered: **14 January 2003**

JUDGMENT

HEHER AJA

HEHER AJA

[1] The appellant, a 27 year old music teacher, was arrested on 18 January 2002. He was detained pending further investigation into charges of indecent assault on boys under the age of 16 years.

[2] An application was brought for his release on bail. The magistrate heard witnesses for the appellant and the State. She refused the application. An appeal to the Johannesburg High Court was unsuccessful. A further appeal with leave of the Court *a quo* was argued before this Court in the recess. At its conclusion we issued an order for the release of the appellant on bail of R5000 subject to appropriate conditions. We said we would furnish reasons later. These are the reasons.

[3] From the outset the State approached the bail application on the basis that s 60(11)(b) of the Criminal Procedure Act, 1977 applied to it. It managed to persuade both previous courts that it was justified in doing so. Section 60(11) provides-

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) . . .

(b) in Schedule 5, but not 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 the interests of justice permit his or her release.'

Schedule 5 includes the offence of indecent assault on a person under the age of 16 years. The State relied on the commission of such an offence or offences to support its reliance on s 60(11)(b).

[4] By the conclusion of the bail hearing the State had presented no evidence of the arrest of the appellant on an identifiable charge (as distinct from a mere restatement of the scheduled offence) nor had a formal charge sheet been drawn up which would have at least informed him of the dates and places of the alleged offences, the names of the complainants and general particulars of each assault which the State attributed to him.

[5] The State refused the legal representatives of the appellant access to the docket on the grounds that to do so would prejudice a continuing investigation.

[6] The appellant gave evidence first, in an apparent acceptance that it was for him to satisfy the magistrate that the interests of justice permitted his release. In the light

of what I have set out above the proper course would have been for the State to have placed evidence before the magistrate to justify its reliance on s 60(11)(b) (including evidence relating to the ages of the complainants, an aspect which seems to have blithely assumed by all concerned on the strength of *ex parte* statements by the prosecutor for when she opened the case). That result could, of course, have been achieved by the production of an appropriate certificate in terms of s 60(11A) (c). I shall, however, assume that by the end of the application the State had done enough to bring the matter within that terms of the section. (This assumption does not exclude the possibility that the court in *Prokureur-Generaal, Vrystaat v Ramokhosi* 1997(1) SACR 127 (O) was correct in finding (at 156e) that the section only operates on an accused who is charged with a definite, circumscribed and understandable offence, which was not so here.)

[7] The appellant denied all the allegations put to him. He called as support for his denial a 12 year old boy, one of his students and his mother. Thereafter the State

called various witnesses none of whom possessed first-hand knowledge of the allegations against the appellant. In rebuttal of the appellant's denial that he had committed any offence the investigating officer was asked to describe to the Court the nature of the allegations against him. She embarked on a lengthy description of reports made to her. She did not make clear which emanated from the statements of one or more of the complainants (said by her to number seven), which derived from parents (at second hand) and which came from other sources (at second or third hand). She disclosed no details of dates or places. The subject of the great majority of such reports was what a psychologist who gave evidence for the State described as 'grooming', i e acts designed to prepare participants for a more adventurous stage of sexual exploration.

[8] Examples of such conduct said to have been engaged in by the appellant included the showing to choir boys of a video with pornographic content, playing suggestive games with boys during which alcohol was consumed, massaging their

bodies (not in an explicitly erotic way) with creams or oil, sharing his bed with boys at night and leading them in the practice of "white magic" rituals. There was no suggestion that any of these escapades took place other than with the consent of the participants. The activities were, no doubt, if the allegations are true, ill-advised, undesirable and improper. Understandably, they provoked the outrage of the parents when revealed, but they provided no inference that the appellant was responsible for an assault on any of the boys. That all these activities influenced the attitude of both courts in regard to the prospect of convictions for indecent assault is nevertheless clear. In this regard the magistrate's judgment was coloured by a fundamental misdirection. She said:

'Indecent assault is not only an offence where the accused has to touch the private parts of the children or otherwise but also any immoral or indecent act which is in its nature or circumstances indecent or immoral.'
(My emphasis)

[9] That is plainly not so. Indecent assault is in its essence an assault (not merely an act) which is by its nature or circumstances of an indecent character. While there may

be cases which 'so fundamentally breach *boni mores* that consent should not be recognised' (P M A Hunt, SA Criminal Law and Procedure, II 457, SA Strauss (1964) 81 SALJ 336, but cf *S v* Matsemela 1988(2) SA 254 (T) at 257 A - D) the acts alleged against the appellant do not fall into such a category. Nor was bodily harm involved. The evidence of the investigating officer did not suggest the unlawful application of force (in the broad sense) or a threat to inflict such force. There was accordingly no justification for the magistrate indiscriminately to have treated the litany of acts chronicled by the investigating officer as evidence of Schedule 5 offences. The court *a quo* found no fault with the magistrate's summary of the case against the appellant. The learned Judge too, perhaps because he was subject to the same misapprehension, made no attempt to identify possible instances of assault among the welter of allegations of improper conduct. (It may be that s 14 of the Sexual Offences Act 1957 was the appropriate resort of certain of the acts described in evidence but such an offence is not included in the Fifth Schedule.) The magistrate should, I think, have

been conscious of the prejudice to the appellant in allowing evidence on the hit and miss approach followed by the State. She should have required the prosecutor to confine her evidence to the offences on which she relied for her invocation of s 60(11)(b) or if the prosecutor intended, in the alternative, to contend also for refusal of bail without reliance on a scheduled offence (which was an option not raised) have ascertained from her precisely which acts of the appellant the State contended for as constituting Schedule 5 offences.

[10] The misdirection I have identified leaves this Court at large to reconsider the evidence in order to concentrate on allegations of indecent assault involving boys under the age of 16 years, to the extent that any such allegations can be found.

[11] **C**ounsel in the appeal were constrained to concede that only two incidents described by the investigating officer during the 74 pages of her evidence seemed to be capable of sustaining an inference of indecent assault. These emerged fleetingly in the following passages-

'Q. [by prosecutor] Can you explain to the court where were these massages?-

A. Your honour, on the boys' backs, buttocks, upper thighs and stomachs. There were isolated incidents where the accused went into the elastic of the boxers [shorts] with his fingers.

Q. Do you know of any incidents where the actual private parts of the children were touched? - Yes your worship there are, there is an instance.'

(My emphasis)

[12] The prosecutor did not follow up either of the incidents. The source and circumstances of both remained undisclosed. Despite cross-examination of the appellant extending to nearly 60 pages neither allegation had been canvassed with him.

[13] During cross-examination of the investigating officer defence counsel suggested to her that the complainants appeared to have made contradictory statements. She replied

'Your honour there is no, at this point in time of the seven statements I have there is no contradictions in any of the statements and I think one has to look at exactly what happened. Indecent assault does not necessarily have to constitute the fondling of the private parts. One has to look at the intent with it as well and there has been an occasion that there has been a fondling of the private parts.'

(My emphasis)

[14] In this instance, also, no further details were furnished, nor were they sought by

the prosecutor in re-examination. The attitudes of the complainants at the time (consenting, indifferent, affronted etc) were not disclosed to the Court. Counsel for the State in the appeal proposed to disclose details of further allegations which, he said, will be placed before the court during the impending trial. We declined his offer. This appeal must be decided on the evidence before the magistrate for better or for worse.

[15] In the context of s 60(11)(a) of the Act the strength of the State case has been held to be relevant to the existence of 'exceptional circumstances': *S v Botha en 'n Ander* 2002(1) SACR 222 (SCA) at para [21], *S v Viljoen* 2002(2) SACR 550 (SCA) at para [11]. There is no doubt that that strength (or weakness) must be given similar consideration in determining where the interests of justice lie for the purpose of s 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a *prima facie* view as to its strength or weakness the accused must

receive the benefit of the doubt. The case presented to the court of first instance fell into the second category. That should have been an important factor in the magistrate's evaluation of the application. Because of her misdirection no proper attention was paid to it.

[16] There were however other considerations which influenced the magistrate and in which the Court *a quo* concurred. This Court cannot reassess the interests of justice without giving them due weight.

[17] The State led evidence through the investigating officer and a psychologist (who had not consulted with the appellant or any of the complainants) that the release of the appellant from custody would result in the direct or indirect influencing of witnesses. The magistrate found in her judgment that-

'The relationship between the complainants and the applicant is to such an extent that they could be influenced or intimidated . . . Obviously the applicant was in a relationship of trust with the complainants and the court has to face the possibility that they will not feel safe if he is released on bail.'

[18] The magistrate held that a likelihood existed that the appellant would attempt to

influence or intimidate witnesses and that he would 'undermine or jeopardise the objectives or the proper functioning of the criminal justice system including the bail system'. She gave as her reasons for these conclusions

(1) the appellant's familiarity with the identity of the witnesses and with the evidence which they might give against him;

(2) the fact that the witnesses had already made statements and some had agreed to testify;

(3) the investigation was not yet complete;

(4) the relationship between the appellant and the various witnesses was one of friendship and trust and he could influence or intimidate them.

[19] I am unable to agree that these factors individually or cumulatively raised a probability that the appellant would act in any manner inimical to the State case. The State chose to play its cards singularly close to its chest. The result was a startling paucity of facts relating to the identity of the complainants, their ages, educational

levels, family circumstances, places of residence (in relation to the appellant's home and opportunities for contact) which might have enabled the magistrate to come to a realistic as distinct from a speculative appreciation. There was also a complete absence of any allegations of attempted intimidation or undue influence. There was no proof whatsoever that the appellant was familiar with the identity of witnesses or the substance of their allegations. That certain witnesses had already committed themselves to the prosecution would, it seems to me, render it less likely that any attempt to influence them would bear fruit. The 'ongoing investigation' was relevant, in so far as one is able to interpret the evidence of the investigating officer, in relation to the possibility that new complainants might come forward. That was, on the facts, too vague a potential to hold against the appellant.

[20] What was clear on the record, but was overlooked by the magistrate, was that there was no evidence that the appellant had attempted to influence witnesses prior to or after his arrest, that the opportunities for contact with the boys had arisen and been

pursued in the specific context of his employment as a teacher, that such employment had been terminated and that the appellant had said under oath that he would make no contact with them if released. (The magistrate did not make a credibility finding against him on this aspect though she described him in general as an unreliable witness.) I would add that in the evidence as a whole there is no suggestion that the appellant used intimidation in his relationships. The conclusion that a likelihood existed that the appellant would interfere with the investigation or the State witnesses was, for these reasons, devoid of factual support. As a possibility it was no more than speculative.

[21] The appellant suffers from a life-threatening disease, diabetes. He requires five meals a day, a special diet and controlled medication. His condition is subject to rapid deterioration if the regimen is not strictly observed. At home he has the benefit of the constant superintendence of his family. He is also undergoing psychiatric therapy. All this was common cause. During an inspection at the prison the facilities provided

for summoning emergency medical treatment were proved to suffer from serious shortcomings. These facts were relied upon for a submission that the appellant would be better off at home than in a prison cell with access to prison medical facilities. I would have thought that that conclusion was overwhelmingly obvious. The magistrate, however, held it against the appellant that his personal doctor had not been called to vouch for the seriousness of his illness, this despite her own observation that the appellant 'shook uncontrollably' in court throughout the hearing. Counsel did not contend with any vigour that the magistrate was correct in requiring medical evidence. I am satisfied that the common cause facts rendered it probable that the appellant was likely to receive better care more promptly at home than he would in prison.

[22] The magistrate expressed fears that the appellant might decamp before the trial. These seem to have been visceral rather than rational. All his family and business connections are on the East Rand, his passport was in the possession of the investigating officer and he is substantially lacking in means. He was, at the time of

his arrest, living in his parents' home in a state of some dependence on them.

[23] The magistrate expressed views which suggested that bail was still a viable option provided appropriate conditions could be formulated to meet the concerns which she had expressed. She seems however to have been distracted from this path by an incident which arose during the proceedings relating to the transporting of the appellant to and from the hospital at which he was temporarily detained. It is unnecessary to rehash the reasons that influenced her. In the Court *a quo* the State conceded that the magistrate had entirely misdirected herself on the facts. The learned Judge accordingly ignored the magistrate's finding that the incident demonstrated a lack of discipline on the part of the accused which was inconsistent with an adherence to such conditions as she might impose. He reassessed the viability of conditions but, in doing so, accepted the magistrate's findings as to the threat which the appellant posed to the witnesses and the investigation, the danger that he might not stand his trial and the failure of the appellant to satisfy the court of first instance that his medical

condition could not just as well be treated in a prison environment.

[24] In summary, this Court is faced with an appellant against whom only the flimsiest of cases was set up; there is no well-grounded reason to believe that he will influence State witnesses pending the trial or will remove himself from the oversight of the authorities; his medical condition persuades one that it in his interest to be released on bail. In the circumstances the interests of justice, considered in the context of s 60(4) and those provisions of ss (5) to (9) which are applicable, and taking into account the personal circumstances of the appellant, lean strongly in favour of the appellant. Nor did we experience any difficulty in formulating appropriate conditions relating to the protection of witnesses and for securing the attendance of the appellant at the trial. For these reasons I conclude that the magistrate wrongly refused to grant bail to the appellant and the Court *a quo* erred in upholding her order.

[25] Two further matters warrant comment before concluding. The first was not argued before us, but I mention it for the consideration of the State in addressing

applications of this nature in future and in the interest of avoiding injustice to applicants for bail. Section 60(11)(b) provides for an accused to be given a reasonable opportunity to adduce evidence to satisfy the court that justice permits his release. There must exist serious doubt, to say the least, whether an accused, favoured by the State with as little information about the charges against him as the appellant was in this case, can be said to have been afforded such an opportunity. Fortunately (since that might have meant the remittal of the application) it has not been necessary to decide this appeal on that issue.

[26] The second matter concerns the question of the court which is most appropriate to hear an appeal of this nature which has been initiated in the magistrate's court and pursued before a single judge of the High Court. The present law allows a further appeal only to the Supreme Court of Appeal (by reason of s 21(1) of the Supreme Court Act 59 of 1959). This appeal, which required no in-depth consideration of legal issues, could however, have been disposed of before a Full Court of the Witwatersrand

Local Division at least as expeditiously and at less expense to both the appellant and the State if the law had provided greater flexibility. This is a concern which warrants the attention of the legislature sooner rather than later.

J A HEHER
ACTING JUDGE OF APPEAL

HOWIE P)Concur
SHONGWE AJA)