THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 484/2009

ABDUL MUTALIED RUDOLPH **Appellant**

and

THE STATE **Respondent**

Neutral citation:	Rudolph v The State (484/09) [2009] ZASCA 133 (30 September 2009)
Coram:	STREICHER, SNYDERS and MHLANTLA JJA
Heard:	28 SEPTEMBER 2009
Delivered:	30 SEPTEMBER 2009
Summary:	Bail – onus in terms of s 60(11)(a) of the Criminal Procedure Act 51 of 1977 not satisfied.

ORDER

On appeal from: Western Cape High Court (Saldanha J sitting as a court of appeal).
The appeal is dismissed.

JUDGMENT

SNYDERS JA (STREICHER and MHLANTLA JJA concurring):

[1] This is an appeal against a judgment of the Western Cape High Court, Saldanha J presiding, in which the judge dismissed an appeal against the refusal by the magistrate at Goodwood to grant bail to the appellant pending his trial on a charge of attempted murder.

[2] At the hearing before the magistrate, during June 2009, the appellant chose to present evidence in the form of his own affidavit, the oral evidence of Dr Ameen, a neurologist, and a report by Dr Thakersee, a cardiologist, both of whom were treating him at the time.

[3] The appellant is a 30 year old South African citizen. Since the age of four he had been living at one address in the Western Cape. For two years prior to his arrest on 29 April 2009 the appellant was employed by his sister in her pawn shop, earning R2 000 per month. The appellant's parents and four of his five siblings live in the Western Cape. He was previously married and has one child, aged four, from that marriage. The child lives with her mother. He owns assets to the value of approximately R50 000. He has never been overseas, he does not have a passport, and has no family or assets outside South Africa.

[4] The appellant married Ms Firdous Rudolph, the complainant, approximately two years prior to the incident that gives rise to the current charge against him. They are the parents of an 18 month old girl. Two months before the incident the complainant separated from the appellant. After their

separation, on 24 March 2009, the complainant obtained an ex parte interim protection order in terms of the Domestic Violence Act 116 of 1998 against the appellant. The order was served on him on 30 March 2009 and was enrolled for confirmation on 13 July 2009. In terms of that interdict the appellant was ordered not to physically, verbally or emotionally abuse the complainant; not to threaten, harass or intimidate her; not to enter her residence at 16 Faust Close, Eastridge; not to enter her place of employment at Morkels N1 City; and not to, directly or indirectly, contact her.

[5] According to the investigating officer, Inspector Abrahams, who testified on behalf of the state at the hearing, the case against the appellant has been fully investigated and is ready for trial. Apart from the evidence of the complainant, three more witnesses are to testify about the incident. The evidence is that on 29 April 2009 the appellant went to the complainant's place of employment, uninvited. He persuaded her to go into the kitchen with him. There he attacked her with a carpet knife. He cut her throat and inflicted various other lacerations, then doused her with petrol from a 500ml Coca Cola bottle that he carried with him and tried to set her alight with his cigarette lighter. When the kitchen door was opened by her colleagues they saw him swinging the knife in her direction, trying to inflict further lacerations, and then trying to set her alight. Once his attack on her was interrupted the appellant proceeded to cut his own throat with the same knife and then left the premises. The bloodied knife and the almost empty Coca Cola bottle were taken from the scene as exhibits. The content of the Coca Cola bottle forensically tested for petrol.

[6] The appellant and the complainant were admitted to hospital after the incident. Flowing from this incident the appellant was arrested in hospital on 29 April 2009 and charged with attempted murder. The very next day the charge against him was withdrawn, as he was in the intensive care unit of a hospital. On 2 May 2009 the appellant was discharged from hospital and on 7 May 2009 re-arrested. The appellant had, in the interim, also laid a charge of attempted murder against the complainant, alleging that the injuries he suffered during the incident were inflicted by her. At no stage did he tender

any explanation for the injuries that were inflicted on her. According to Abrahams a decision was made not to prosecute the charge by the appellant.

[7] On 11 May 2009 the appellant suffered a massive heart attack and a second one later in the same month with the result that he was left with 70 per cent loss of function in the left ventricle of his heart together with coagulated blood in an artery that supplies the wall of his heart with blood. A piece of the coagulated blood dislodged and caused a stroke. Since his first heart attack the appellant has been treated at the Gatesville Medical Centre by Dr O S Ameen, a neurologist, Dr S N Thakersee, a cardiologist, and a psychiatrist. The gist of the evidence of both doctors was that prison is not the ideal environment for the appellant's recovery. Although, according to Dr Ameen the appellant's condition has stabilised and would improve, imprisonment would delay his healing and presents some risks. Any form of anxiety, which implies an increased heart rate, could result in further damage to his heart and another stroke. As the appellant is receiving blood-thinning medication, any form of trauma could cause excessive bleeding and, in fact, even spontaneous bleeding is possible. Swift access to the appellant in the event of any of these occurrences is essential to help him and in prison such access is unlikely. According to Dr Ameen's experience of working at Groote Schuur Hospital, where prisoners are treated, instructions by doctors are not efficiently implemented.

[8] Although the appellant has no previous convictions, he was on bail of R2 000 pending his trial on charges of rape and attempted murder allegedly perpetrated on his former wife at the time of the incident on 29 April 2009. The incident has given rise to a second charge of attempted murder. Attempted murder is an offence referred to in Schedule 5 to the Criminal Procedure Act 51 of 1977 (the Act). Schedule 5 includes '[a]ttempted murder involving the infliction of grievous bodily harm' and 'rape'. A Schedule 5 offence committed whilst 'released on bail in respect of an offence referred to in Schedule 5' constitutes an offence under Schedule 6. Section 60(11)(a) of the Criminal Procedure Act 51 of 1977 prescribes that in the case of offences falling within the ambit of Schedule 6 that '. . . 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'.

[9] The section places an onus on the appellant to produce proof, on a balance of probability, that 'exceptional circumstances exist which in the interests of justice permit his' release.[1] It 'contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist'.[2] Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4) to (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified. [3]

[10] The case presented on behalf of the appellant is that his attachment to his community and environment and poor health constitute exceptional circumstances that 'in the interests of justice permit his release'.[4]

[11] The appellant is rooted in his community and he is physically frail. Dr Ameen conceded during evidence that the appellant's condition would, however, improve. Despite being in custody he is receiving adequate medical attention as is reflected by the evidence of Dr Ameen. As an arrested person he is entitled 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;'.[5]

[12] The appellant's case is characterised rather by what he does not address than by what he does. The state's case against him is that he

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[1] *S v Dlamini* 1999 (2) SACR 51 (CC) para 78.
[2] *Dlamini* para 64.
[3] *Dlamini* para 76; *S v Botha* 2002 (1) SACR 222 (SCA) para 19.
[4] These are factors listed in s 60(6) of the CPA as relevant considerations in an enquiry whether the ground in s 60(4)(b) has been established.
[5] The Constitution of the Republic of South Africa 108 of 1996, s 35(2)(e).

attempted to murder his wife by the use of barbarous violence. He has made no attempt to meet that case. The complainant obtained the interim interdict against him on allegations of violence and threats of violence by the appellant against her and their child. None of these allegations are addressed by him. He has also not tendered any explanation for the charges of attempted murder and rape by his former wife. Those charges also involve acts of violence. Thus the unchallenged allegations against him show that he has a propensity to violence.[6] In those circumstances subsecs 60(4)(a) and (d) of the Act prohibits his release from detention. It is apposite to quote all of s 60(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;

(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; or [sic]'.

Offences listed in Schedule 1 to the Act include murder, culpable homicide, rape, sexual assault, assault when a dangerous wound is inflicted and arson.

[13] The appellant, despite the onus on him, did not introduce any evidence to show that he is not likely to act in terms of the propensity to violence that his past undisputed behaviour illustrates. His physical condition, as evident at the time of the hearing, even in the unlikely event of no improvement, may prohibit him from physically employing some forms of violence, but is not

[6] All of these factors are listed in s 60(5) of the CPA as relevant to the consideration whether the ground in s 60(4)(a) has been established.

evidence that the propensity no longer exists nor that he would be unable to commit any violence.

[14] It was argued on behalf of the appellant that appropriate bail conditions, like house arrest, could adequately safeguard all interests.[7] The impracticality of house arrest was conceded during argument. Apart from that the appellant was in breach of an interdict and bail conditions when he committed the offence currently charged with. He did not adduce any evidence to explain the commission of an offence whilst on bail pending charges of attempted murder and rape. He only tendered an explanation for ignoring the interdict against him. He alleged in this affidavit that the complainant invited him to meet with her and that they were likely to reconcile. This explanation misses the point. The interdict was served on him on 30 March 2009, less than a month before the incident. The date for confirmation was set for 13 July 2009. Neither the appellant nor the complainant had taken any steps to change the set course or effect of the interdict. One of the express terms of the interdict aims at keeping the appellant away from the complainant's place of employment. The unanswered allegations by the state are of violence against the complainant at her place of employment, the very thing she wanted to prevent by obtaining an interdict in the terms that she did.

[15] The appellant has not addressed his propensity to ignore court orders illustrated by his past behaviour. He has also not furnished any evidence, despite the onus being on him, that he is unlikely to behave with the same disregard in the future.[8] He has, therefore, not addressed the evidence that his release will 'undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system'.

[16] When all the allegations are weighed up at least two of the grounds listed in s 60(4) have been established. In those circumstances the release on

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[7] *S v Branco* 2002 (1) SACR 531 (W) at 537a-b.

[8] These factors are relevant to consider whether the ground in s 60(4)(d) has been established.

bail of the appellant is not permitted. The court a quo was therefore correct in upholding the refusal of bail by the magistrate.

[17] The appeal is dismissed.

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S SNYDERS
Judge of Appeal

Appearances:

For the appellant:	F Roets
	Instructed by: F Rudolph Attorneys, Cape Town Symington & De Kok Attorneys, Bloemfontein
For the Respondent:	C De Jongh
	Instructed by: Director of Public Prosecutions, Cape Town Director of Public Prosecutions, Bloemfontein