

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no: CA&R 92/2024

In the matter between:

NKOSIKHONA ROGERS WILLIAMS

Appellant

and

THE STATE

Respondent

BAIL APPEAL JUDGMENT

GQAMANA J

[1] This is an appeal in terms of section 65 (1) of the Criminal Procedure Act, 51 of 1977 (the CPA) against refusal by the magistrate to admit the appellant to bail. The appeal is opposed by the State.

[2] In terms of section 65 (4) of the CPA, this Court shall not set aside the decision against which the appeal is brought, unless it is satisfied that the decision was wrong. The powers of this court to interfere with the decision of the magistrate are largely limited. Although this Court may have a different view, but it should not substitute its own views for that of the magistrate, because that would be an unfair interference with the magistrate's exercise of discretion.¹

¹ S v Wardle, (unreported, ECP case no. CA&R 5/2018, 10 May 2018) and S v Panayiotou (unreported, ECG case no. 06/2015, 28 July 2015).

[3] In the matter at hand, the appellant is charged with a Schedule 5 offence (murder).

According to the provisions of section 60 (11) (b) of the CPA, the onus is upon the appellant to adduce evidence which satisfies the court that the interests of justice permit his release.

[4] At the bail hearing the appellant presented his evidence in the standard form affidavit. His personal circumstances as set out therein are as follows: he was 33 years of age and unmarried. He has three minor children. He was gainfully employed as a school transport driver earning an income of R1 500 per month. He used his income to support his children. He has no pending cases, or outstanding warrants of arrest. He has no previous conviction. He handed himself over to the police and was arrested on 2 December 2023. He intends to plead not guilty. He confirmed under oath that, he had made no threats to anyone, nor did he harbor resentment against anybody.

[5] However, the main basis for the State to oppose his bail application is that the appellant had threatened witnesses. Captain Fete, in his affidavit, made an allegation that information came to him that the appellant threatened witnesses. That evidence was in conflict with the allegations made by the appellant in his affidavit. Not much evidence was presented about this alleged threat to witnesses. Apparently, the witnesses reside in the same vicinity with the appellant.

[6] The reasons for refusing bail are scant but clear. The magistrate considered the prevalence of this type of offence in the area concerned, the degree of violence used during the commission of this offence and the likelihood that the appellant would intimidate witnesses. The magistrate further held the view that the release of the appellant on bail would cause an outcry in the community.

[7] There are seven grounds of appeal as set out in the notice of appeal. However, the gist of the submissions on behalf of the appellant is that the magistrate misdirected herself in finding that it was not in the interests of justice to permit the release of the

appellant on bail. It was further submitted that the magistrate failed to take into account the interest of the appellant's minor children.

[8] The magistrate is deaf silent on the interest of appellant's minor children. There is no evidence on whether the appellant is the primary care giver of his minor children. It does not appear that this issue was considered at all by the magistrate. To the contrary, it appears that the magistrate over-emphasised the prevalence of the offence and degree of violence and placed no regard to the appellant's personal circumstances and the interest of his minor children.

[9] In a bail application, the magistrate must consider all the relevant aspects for and against the granting of bail. It was wrong for the magistrate to over-emphasise aspects which militate against the granting of bail, whilst aspects in favour of the appellant were not given sufficient weight. In addition, it was crucial for the magistrate to have evidence on the interest of the appellant's the minor children before she could make a decision whether to refuse or grant bail. It is clear from section 60 (10) that the court's function in bail application is intended to be more proactive than in a normal criminal proceedings.² Further the magistrate should have allowed the appellant to adduce rebutting evidence on the alleged intimidation or threats to witnesses, especially that there were conflicting allegations on this issue between the affidavit of the appellant and that of Captain Fete.

[10] In light of these misdirections, the decision of the magistrate was wrong, and the appeal ought to succeed. However, due to lack of evidence on the interest of the minor children and the alleged threats to witnesses, the appropriate order would be to remit the matter for the magistrate to hear evidence on such issues and to consider the bail afresh after hearing such evidence.

² Sv Green and Another 2006 1 SACR 603 (SCA) at 610b.

[11] In the circumstances, the following order is issued:

1. The appeal is upheld.
2. The decision of the magistrate, in the bail application is set aside and the matter is remitted to the same magistrate to consider the bail application afresh after hearing evidence on the appellant's minor children's interest and the alleged threats to witnesses.
3. The State is to be afforded the opportunity to adduce further evidence in response to any further evidence presented by the appellant.
4. The appellant shall remain in custody pending the finalisation of the bail application by the magistrate.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant:

Mr A Mgangatho

Instructed by:

Mgangatho Attorneys, Makhanda

Counsel for the Respondent:

Adv A A Nohiya

Instructed by:

Director of Public Prosecutions Makhanda

Date heard on:

12 June 2024

Delivered on:

12 June 2024