

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: CA&R 67/2023

Date heard: 07-03-2024

Date delivered: 13-03-2024

In the matter between:

WALTER MORATIWA SAUL

Appellant

and

THE STATE

Respondent

CORAM: WILLIAMS J:

REASONS FOR JUDGMENT

WILLIAMS J:

1. On 7 March 2024 I made an order, agreed to between Mr Nel for the appellant and Ms Engelbrecht for the respondent, in the following terms:

“1. The decision of the trial court to refuse bail to the Appellant pending his trial is herewith set aside and replaced with the following order:

2. *Bail is granted to the Appellant in the amount of R5000.00 on the following conditions:*

(a) That he attends all court appearances.

(b) That he resides at his grandparents’ house in Rietfontein and if he wants to change his place of residence, he must inform the

investigating officer, Sergeant Moseme, in writing of the new address seven (7) days prior to his relocation.

(c) That he refrains from visiting the premises of M[...] S[...] School.

(d) That he does not make any contact, directly or indirectly, with any of the State witnesses whose names appear on the list that the investigating officer will file on him.”

2. My reasons for the order follow herewith.
3. The appellant was arrested on a charge of the contravention of s15 of Act 32 of 2007, an act of consensual sexual penetration with a child under 16 years of age, also known as statutory rape.
4. At the bail application held in the Magistrates Court, Jan Kempdorp, the prosecutor submitted that the offence resorted under Schedule 6 of the Criminal Procedure Act (the CPA). The appellant's attorney agreed with the submission and the magistrate simply accepted it as being the position. Schedule 6 however specifically provides for rape or compelled rape as envisaged in s3 or s4 of the Criminal Law (sexual and related matters) Amendment Act 2007, in the circumstances listed in the schedule. Sections 3 and 4 of the aforementioned Act relate to acts of non-consensual sexual penetration.
5. Statutory rape does therefore not resort under Schedule 6. Counsel appearing before me have submitted that the court *a quo* should have disposed of the bail application under Schedule 1 of the CPA which includes *inter alia*:

“Any offence, except the offence of escaping from lawful custody in circumstances other than circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months, without the option of a fine.”

I agree with the submission.

6. The consequence of the incorrect categorization of the offence resulted in the appellant's bail application being dealt with in terms of the provisions of s(60)(11)(a) of the CPA which places the onus on an accused to convince the court that there are exceptional circumstances which permit his/her release in the interests of justice. In the result the court *a quo* held after hearing the evidence of the appellant, his witness Mr Moncho and Sergeant Nhlathi who stood in for the investigating officer, that the appellant had failed to show exceptional circumstances and that it was therefore not in the interests of justice to release him on bail.
7. There can be no doubt that the court *a quo*'s failure to deal with the bail application on the basis that the offence was one falling under Schedule 1, was irregular.
8. S65 (4) of the CPA which deals with the powers of the court in bail appeals provides as follows:

“(4)The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.”

I therefore have to consider whether the interests of justice permits the appellant's release on bail.

9. S60(4) sets out the instances where it would not be in the interests of justice to release an accused on bail as follow:

“(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;*
- (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 if the likelihood that the accused if he or she were released on bail, will undermine or jeopardise the objectives of 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;”*

10. I now turn to the facts of the matter.

The appellant is a 45 year old educator at the same school where the victim is a female learner, aged 14. He has subsequent to his arrest been suspended with full remuneration on conditions *inter alia* that he refrains from entering the school and that he is prohibited from making contact with any employee, educator, learner or any person attached to the school.

11. The conditions of the appellant's suspension already in part address the likelihood that he would attempt to influence or intimidate witnesses. There was in any event no evidence to this effect.

12. The investigation at the scene where the alleged offence took place has been completed and there can be no likelihood of the concealment or destruction of evidence should the appellant be released on bail.

13. The appellant has family and dependents within this jurisdiction and a fixed residence. When he was informed of the complaint, he voluntarily handed himself over to the police. In these circumstances a likelihood to evade trial or to abscond has not been shown.
14. The likelihood of any of the events referred to in s60 (4) (a), (d) and (e) has not been addressed by the State in the bail application and therefore has no relevance to the issue at hand.
15. In the circumstance I was of the view that the interests of justice dictate that the appellant be released on bail on the conditions as agreed to by the parties, hence the order made.

C C WILLIAMS
JUDGE

For Appellant: Adv. I Nel
CM De Bruyn & Partners

For Respondent: Adv. M Engelbrecht
Office of the DPP