

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Appeal case no: **A148/2024**

Magistrate's court case no:
20/553/2024

In the matter between:

M[...] T[...]

Appellant

and

THE STATE

Respondent

Neutral citation: XXX

Coram: Cronje, AJ

Heard: 13 September 2024

Delivered: 20 September 2024

Summary: Bail – appeal against dismissal of application of bail in magistrate's court – two counts of rape of biological daughter – Schedule 6 offence – appellant submitting written affidavit setting out factors justifying his release on bail – on the strength of deficient investigating officer's statement, the state does not oppose bail – further statements and investigation outstanding – magistrate enquiring whether the state will prove charges – deficiencies in procedure – matter remitted back to magistrate's court for reconsideration.

ORDER

The matter is remitted to the Bloemfontein Magistrate's Court to urgently reconsider the bail application and afford the parties an opportunity to address all relevant facts within 10 days from the date of this judgment.

JUDGMENT

Cronje AJ

Introduction:

[1] The appellant appeals against dismissing his bail application on 26 August 2024 in the magistrate's court of Bloemfontein.

[2] The grounds of appeal are briefly stated:

2.1 The investigating officer and the prosecutor did not oppose bail. The court over-emphasises the justice interest, failing to strike a proper balance;

2.2 The court failed to take into account that the appellant was presumed to be innocent;

2.3 The court failed to consider that the appellant had no previous convictions or pending cases and that the appellant was not a flight risk;

2.4 The court failed to consider that the appellant receives a salary he uses to provide for his children. If bail is refused, he might lose his employment;

2.5 The court erred in concluding that the provisions in s 60(4) of the Criminal Procedure Act, 51 of 1977¹ (CPA) had been established. The court failed to consider appropriate bail conditions as an alternative to denying bail;

2.6 The court failed to properly apply the provisions of Section 60(9) of the CPA when she weighed the interest of justice against the personal circumstances of the appellant, whereas it is required that the interest of justice be weighed against the right

¹ Criminal Procedure Act 52 of 1977.

of the appellant to his freedom and the prejudice that the appellant may likely suffer if he was detained;

2.7 The court misdirected itself in finding that the appellant's personal circumstances must outweigh the interest of justice. The fact that the court found that a *prima facie* case has been established does not per se justify a refusal of bail; and

2.8 The court ignored the evidence presented by the investigating officer, the prosecutor, and the appellant.

[3] The appellant did not propose bail conditions that may be set.

The charges of rape

[4] The charge sheet provides:

'The accused should be informed that if Section 51(1)(a)(iii) of Act 105 of 1977 is applicable that the court will have a sentencing jurisdiction set out in Part 1 of Schedule 2, that of life imprisonment.

(The accused must be informed that he may be included in the National Register of Sex Offenders).

RAPE

In that on or about the _____ 2014 at or near Bloemfontein in the District of Bloemfontein and within the Regional Division of the Free State, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, Puleng Mokoena (+_ 6 yrs) by penetrating her genitally without the consent of the said complainant and thus raped him/her.'

[5] It is common cause that the complainant was younger than 16 years on the first charge and younger than 18 years on the second charge. As the biological daughter of the accused, she was in a domestic relationship as defined in s 1 of the Domestic Violence Act 116 of 1998. The rape in 2014 carries a minimum sentence of 10 years imprisonment as he was alleged to be a first offender.

[6] The second charge reads the same as the first charge, save to state that the offence was committed in 2023. This offence carries a minimum sentence of life imprisonment.

The evidence of the appellant

[7] The appellant did not present *viva voce* evidence and submitted an affidavit supporting his application. The salient averments are that he is 30 years old, a South African citizen and resides in Phase 2, Bloemfontein. He exercises his constitutional right not to present evidence and intends to plead not guilty against the charges. He is a mechanic at a construction company in Bloemfontein and earns a salary of R16 800.00 per month, after deductions. He is married, and his children are between six and 17. The children rely on him financially as they attend a primary and a secondary school. He owns furniture of R30 000.00 and motor vehicles whose value he could not state. Furthermore, he rents an apartment at R2 500.00 per month. The interest of justice requires that he be released on bail on the following grounds. He sends money to his spouse to provide for his children. He has a fixed address, which was confirmed by the state. He has no pending cases against him or any previous convictions. There were no protection orders against him, and he cooperated with the police. He has no warrants against him, and he has strong emotional and family ties in South Africa, and it is '*doubtful*' that he will evade his trial. He runs the risk of losing his employment if bail is not granted.

[8] He would abide by conditions that the court may set in granting him bail and would not commit further offences or endanger the safety of any particular person. He would also not threaten State witnesses or inflict harm on such witnesses nor would he interfere in the State's investigation and would be able to pay an amount of R1 000.00 if he is released on bail. He maintains good health.

The evidence of the state

[9] In an affidavit in support of a bail application, the investigating officer, Mr Thabo Mokoena, states that the victim reported that her father raped her when she was six years old, and now, on the 13th, he touched her on the thighs. He states that the appellant is a first offender, does not have previous convictions, and the complainant does not reside with the appellant. The sentence in the statement is incomplete, but that appears to be what was intended to be stated. He confirms that

the appellant is not linked to further charges. The affidavit is not affirmed but stamped by the court clerk on 4 September 2024.

The court's enquiries

[10] The court enquired about the fact that the investigating officer's statement refers to touching the minor's thigh, which does not constitute rape. The prosecutor thereupon stated that the docket indicated that there were two counts of rape, and the touching of the thighs was in addition to it. The complainant is the appellant's biological daughter. The court remarked that the investigating officer's affidavit says nothing but nevertheless was accepted as exhibit 'B'. The state did not present any further evidence by documentation or *viva voce*.

[11] The court enquired from the prosecutor why the State was not opposing bail as the affidavit did not inform her of anything. The prosecutor stated that the address of the appellant had been confirmed, there was no likelihood that, if released on bail, he would endanger the safety of any particular person, would not reside with the complainant and would request that a condition be set that the appellant does not make contact with witnesses of the complainant. He referred to s 60(4)(a) to (e). He then stated that the appellant may be released on bail. The prosecutor noted that the investigating officer's affidavit did not solicit enough information and only stated that the appellant no longer resides with the complainant.

[12] The court enquired whether a *prima facie* case existed on both counts, which the prosecutor confirmed. The court then asked: 'If you will prosecute, will he get a conviction?' to which the prosecutor answered: 'That is correct, Your Worship, and apparently he started, she reported this at school first, to the social worker at school that what has been happening then this thing that prompted the complainant just to speak out is that the last incident, the one that the investigating officer has mentioned the issue of touching of thighs, is the one that prompted the complainant now to speak about the incidents that happened previously.'

[13] The court requested that the prosecutor address the factors in s 60(6)(f), (g), (h), as well as 60(7)(a). The prosecutor stated that the offence was serious and that life imprisonment was the minimum sentence that ought to be imposed. The strength of the State's case is strong. Regarding s 60(7) and (8), it was confirmed that the

appellant is familiar with his daughter, but it was, at that point, unclear whether there were any other witnesses. However, there was a report of the social worker. Also, a statement from the brother of the complainant was not yet obtained, but there is a J.88. An additional statement from the complainant was outstanding, which would clarify certain issues.

[14] The court asked the appellant's representative whether he wished to add anything for consideration of bail. He replied that the court should consider an amount as a condition. He submitted that the offer of R1 000.00 should be reduced to R500.00. The court was not impressed and stated that 'How could a submission be made for payment of R500.00 on two (2) counts of rape of his daughter.' The court considered the ability to pay as a factor. However, the appellant's representative was not allowed to address the issues raised by the magistrate with the prosecutor.

The magistrate's judgment

[15] The magistrate found that the basis of the application was mainly financial. He may lose his employment, and his family may suffer. The state does not oppose bail; he does not have previous convictions; there are no pending cases against him, and the State does not believe that he would interfere with witnesses. Section 60(10) of the CPA places an obligation on the court to, notwithstanding that the State is not opposing bail, weigh up the personal interest of the appellant against the interest of justice, which includes the safety of any person against whom the offence was committed. The appellant allegedly raped his minor daughter twice and is known to his daughter. The offences constitute gender-based violence against his biological daughter within a domestic relationship.

[16] The state has a strong (*prima facie*) case against the appellant, and he may be sentenced to life imprisonment upon conviction. The magistrate concluded that considering s 60(6)(f), (g) and (h) and 7(a) and (b) and having considered all factors, there are no exceptional circumstances for the appellant to be released on bail and bail was refused.

Evaluation

[17] Mr Thebe relies on the principle that all persons are deemed innocent until

proven guilty.²

[18] In *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat*³ the proper approach in bail applications was stated as follows:

‘Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note about the bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regards to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.’⁴ (Footnote omitted.) (Own emphasis.)

[19] In *Moola v S*⁵ (*Moola*) the granting of bail with reference to the seriousness of the charge of rape and sexual assault was stated as follows:

‘The charge of rape of a minor child is serious and a term of life imprisonment shall be imposed unless substantial and compelling circumstances are present. In addition, there is an outcry in the community in respect to gender based violence crimes. The fact that the appellant states this matter is in respect to his daughter does not lessen the crime. A nine-year-old child cannot protect herself against the advances of an adult man. In addition, according to the complainant’s version, she was told by the appellant not to mention anything that had happened.’⁶

The strength of a case against an accused and the nature and gravity of punishment which is likely to be imposed are some of the grounds which, in terms of s 60(6) of the Act, a court

² *S v du Plessis* 1993 (2) SACR 379 (T) at 384-385.

³ *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771.

⁴ *Ibid* para 11.

⁵ *Moola v S* [2023] ZAGPJHC 97.

⁶ *Ibid* para 38.

should consider in determining whether there is a likelihood of an appellant evading trial. In South Africa domestic disputes are rife and our country is engulfed with gender based violence. Such actions of the appellant need to be carefully considered before releasing him on bail.⁷

Due to the fact that the main consideration for the court in applications of this nature is the increased risk of the appellant absconding, such risk was not emphasised by the respondent in the Court *a quo*. This is extremely strange to this Court in light of all the time that the appellant was in South Africa but never handed himself over to the police.’⁸

[20] The appellant, in the instant bail appeal, alleged that he cooperated with the police.

[21] Some of the concerns raised in *Moola* were that neither the investigating officer nor the prosecutor opposed the bail application. The complainant was nine years old when she made her statement. There was no statement from the complainant’s mother.

[22] In *Motsi v S*⁹ it was emphasised that the court must be informed of all relevant and substantial facts:

‘The State is required to put all the necessary and relevant substantial facts before the court for the purposes of upholding the right of a bail applicant to be apprised of the case which he faces, in the bail application. This will enhance the impartiality of the courts and their independence in exercising their judicial functions. It also adds to the flavor of bail proceedings being *sui generis*. A bail application is unique and special. Its inquisitorial characteristic is one manifestation. In my view, the other manifestation of its unique and special character are that the interests of justice demands that the State begin and apprise the applicant and the Court of the case which the applicant has to face, especially in section 60(11) proceedings where the so-called reverse onus is found. The further manifestation is that the applicant bears the onus to satisfy the court on a balance of probabilities that the interests of justice do not require their detention [S v *Branco* 2002(1) SACR 531 (W) at 532E-G]. The onus on the applicant and the State bearing the duty to begin and adequately inform the court of the substantial facts, are not

⁷ Ibid para 39.

⁸ Ibid para 40.

⁹ *Motsi v S* [2022] ZAWCHC 151; 2023 (1) SACR 218 (WCC).

mutually exclusive in a unique procedure specifically designed to administer justice.¹⁰ (Own emphasis.)

[23] Two of the most concerning issues that emanate from the bail application is that notwithstanding the seriousness of the alleged crimes and the public outcry when bail is granted for these offences, they abdicated their duty to place all the substantial facts before the court. A vague allegation is made which purports to state that the appellant does not reside with the complainant. It reads:

‘First offender

The suspect does not have previous conviction

The victim does not reside w_____’

[24] The following appears from the transcript:

‘COURT: Okay, just tell me since when is he no longer staying with the victim?’

PROSECUTOR: Your Worship, the thing is this affidavit, the investigating officer did not ask enough information. he just mentioned that accused person is not staying with the complainant. So, we don’t know, it is not clear whether they are staying in the same place as before or what or because of this incident that the complainant is no longer staying with the accused person. So unfortunately, he did not give us sufficient information regarding that aspect, Your Worship.’

[25] One gains the impression that the prosecutor was ill-prepared for an engagement with the court on the provisions of the Act and what is required to be established. The investigating officer refers to only one charge, ignoring the second.

[26] The appellant was not allowed to show how he contributed to the expenses of the family and children, specifically when reference was made to prove. Whilst an accused is under no obligation to testify in his bail application, the use of proforma statements creates the risk that the court is not fully appraised of all material and substantial facts for consideration.

¹⁰ Ibid para 71.

Conclusion

[27] Both parties failed to assist the magistrate in evaluating the facts and considerations. It does not serve the interest of justice, and upholding or dismissing an appeal under these circumstances would be unfair.

[28] The matter should be referred back to the magistrate's court for a proper evaluation.

[29] I therefore make the following order.

ORDER

The matter is remitted to the Bloemfontein Magistrate's Court to urgently reconsider the bail application and afford the parties an opportunity to address all relevant facts within 10 days from the date of this judgment.

CRONJÉ, AJ

Appearances:

For the Appellant:

Adv BKJ Thebe

Mr LP Shiba

Instructed by:

LP Shiba Attorneys

Bloemfontein

For the Respondent:

No appearance