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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NUMBER: A168/24**

In the matter between:

**SIBABALO TWAISE**

Appellant

and

**THE STATE**

Defendant

*Date Heard: 27 August 2024*

*Delivered on: 03 September 2024*

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**JUDGMENT**

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**MATLHAPE, AJ**

**INTRODUCTION**

1. This is a bail appeal in terms of the provisions of *Section 65 (1) (a) of the Criminal Procedure Act, Act 51 of 1977* as amended (“*The Act*”) against the decision of the magistrate for the refusal of bail on 18 July 2024 at the Bellville Magistrate’s Court.

*Contextual Background*

2. The Appellant is arraigned on a charge of contravening the provisions of *Section 3 read with Sections 1, 56, 56A, 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 32 of 2007* read further with the provisions of *Section 51(1)/51(2)(b) of the Criminal Law Amendment Act 105 of 1997* and read further with the provisions of *Section 256 and 261 of the Criminal Procedure Act* (“*The Act*”) in that it is alleged that on or about 9 July 2024 and at or near 2[...] P[...] Street, Delft South, in the district of Bellville the Appellant did unlawfully and intentionally commit an act of penetration with the complainant without her consent by penetrating her vaginally using his finger.

3. The complainant in this matter is an 8-year-old girl.

4. The Appellant’s first appearance at the court *a quo* was on 11 July 2024 and the matter was postponed to 18 July 2024 for a formal bail application.

5. The application was conducted in terms of *Section 60(11)(a) of the Act* which reads as follows:

*“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*

*(a) 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 there are exceptional circumstances, which in the interest of justice permit his or her release on bail”.*

### *The Appellant’s Case*

6. The Appellant’s testimony was contained in an affidavit which was read into the record. The Appellant’s testimony is that he is an unmarried father of two minor children. He is gainfully employed at M[...] Hospital in Mitchells Plain as a nurse. He

further contends that he does not know the witnesses that the state intends to call in this matter. He does not have any previous convictions or pending cases. He contends further that his release on bail will neither endanger the safety of the public nor any particular person. His testimony is further that he will not disturb public order or undermine public peace or security. He contends that should he be admitted to bail, he shall not evade his trial but will attend court at every remand date and will remain in attendance. He states that he will not interfere with the police investigations or conceal evidence of any nature.

7. He further states that he will not influence or intimidate the witnesses in this matter and that he is not a flight risk. His release on bail will not undermine or jeopardies the proper functioning of the criminal justice system, including the bail system.

8. The Appellant's testimony regarding exceptional circumstances is that he is gainfully employed, he has two minor children whom he supports financially, and he also supports his mother. He contends that the state's case against him is weak and he denies the allegations against him stating that he knows nothing about them.

9. Regarding alternative place of accommodation, an affidavit of one Thandeka Twaise was accepted by the state at the beginning of the hearing of the application without any need for the verification of the address in question. Ms Twaise's testimony is that should the Appellant be admitted to bail, he would reside with her at her home in Mitchells Plain.

### *Respondent's Case*

10. Constable Arnold, the investigating officer, submitted an affidavit opposing bail, primarily because the appellant and the complainant live in the same premises, being a block of flats. As far as the facts of the matter are concerned, her testimony is that on the day in question, the Appellant allegedly called the complainant to his house to send her to the shop. When the complainant entered his house, the Appellant told her to close the door, which she did. He then instructed her to take off

her clothes, which she refused. He proceeded to take her clothes off and inserted his finger inside her vagina. No further evidence was led on behalf of the state.

11. After hearing and considering the matter, the Magistrate dismissed the application and refused bail.

### Applicable Principles

11. In approaching a bail appeal, the Court is guided by the provisions of *Section 65(4)* which states the following:

*“65 Appeal to superior court with regard to bail*

*(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”.*

12. In *S v Mbele and Another*<sup>1</sup> the Court had this to say *“this Court is required to approach the appeal on the assumption that the decision of the Court below was correct and not to interfere with that decision unless “satisfied” that it was wrong”.*

13. In determining whether this court should interfere with the magistrate’s exercise of her discretion, this Court should have regard to *S v Barber*<sup>2</sup> wherein the court had this to say:

*“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own*

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<sup>1</sup> 1996 (1) SACR at 221, para H

<sup>2</sup> 1979 (4) SA 218 (D) at 220 E to H

*view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed, that no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."*

*Appellant's grounds for appeal*

14. In view of the legal principles enunciated herein above, it of importance that the court should have regard to the Appellant's grounds of appeal. The grounds of appeal raised mainly focus on the following issues:

- a. That the magistrate erred in refusing bail even though the state did not oppose the alternative address provided by the appellant;
- b. The state's main reason for opposing bail is that the Appellant and the complainant resides in the same premises;
- c. No evidence was adduced by the state proving that the grounds laid down in *Section 60(4) of the Act* are present;
- d. The magistrate failed to take into account the fact that the state conceded that its case against the Appellant is weak even after the Public Prosecutor, submitted that:

*"Your Worship, and when the charges are initiated it is at that point still a 'he say', she say' aspect. I can agree with my learned colleague that at this stage, the strength of the State's case is questionable.";* and

- e. That the magistrate failed to take into account the Appellant's personal circumstances together with the facts of the case which, cumulatively, dictated that exceptional circumstances exists which in the interests of justice, permitted the release of the appellant on bail.

15. These grounds will be addressed herein below by weighing the evidence that was presented before the court *a quo*, against the legal prescripts relevant to this application.

Application of the law to the facts

16. As stated herein above, one of the grounds of appeal relates to the fact that the bail was refused even though the grounds listed *in Section 60(4) (a) to (e) of the Act* are not present and further the accused's circumstances were not weighed against these grounds.

17. *Section 60(4)(a) of the Act* states as follows:

*(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.*

18. The Appellant's contention is that there is no evidence before the court *a quo* to the effect that should he be released on bail, he will endanger public safety or any particular person or will commit a Schedule 1 offence.

19. In *S v Diale and Another*<sup>3</sup>, the following was said:

*A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in Section 60 (4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released."*

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<sup>3</sup> 2013 (2) SACR 88 para 14

20. Given the investigating officer's testimony, there is no evidence to support the likelihood that the Appellant, if released on bail; would endanger public safety or commit a Schedule 1 offence. Following the reasoning in *Diale* above, the magistrate misdirected herself in refusing bail.

21. Another ground of appeal is that the Appellant argues that he provided the State with an alternative residential address, which the state accepted without verification. As far as this ground is concerned one will have to look at *Section 60(4)(b)* which reads as follows:

*"Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial."*

22. At the hearing of the application the court *a quo* asked whether the state is satisfied with the affidavit of Ms Twise, and even went further to provide some guidance to the state by saying *"or you can say I want to hear it from her on the record under oath or you can say -well, I am not satisfied I do not want an affidavit, I want this. I want the investigating officer to go out to that address, which is it?"*. To which the Public Prosecutor answered *"State would be satisfied with the sworn affidavit, Your Worship"*

23. The above evinces the fact that the state did not consider the Appellant a flight risk or someone likely to evade his trial. As a result, the court *a quo* misdirected itself by not considering this factor.

24. The Appellant also contends that he does not know the witnesses that the State intends to call in this matter. In this aspect, regard is to be had to the provisions of *Section 60(4)(c)* which reads as follows:

*"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".*

25. No evidence was presented before the court *a quo* to suggest that the Appellant if released on bail would intimidate state witnesses. The court *a quo* did not address this issue in weighing the evidence against the interests of justice. Absent any evidence to the effect that the Appellant, if released on bail, will intimidate witnesses or conceal evidence, I am of the view, that the court *a quo* misdirected itself in not taking this factor into account.

26. The Appellant contends further that, there is no evidence before the court *a quo* suggesting that there is a likelihood that if he is released on bail, he will undermine the proper functioning of the criminal justice system, including the bail system. In considering the above the court has to look at the provisions of *Section 60(4)(d)* which reads as follows:

*“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.”*

27. The investigating officer's evidence does not support any contention that there is any likelihood that, should the Appellant be released on bail, he will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system. The court *a quo* is also silent on this issue.

28. Counsel for the state argued that the court *a quo* primarily focused on what it considered as the Appellant's failure to prove exceptional circumstances and once the Court was so satisfied, it did not to deal with the grounds laid down in *Section 60(4) to (9)*. In support of this contention, counsel for the state went on to submit that the magistrate failed to do so because the lower courts are exceptionally busy.

29. I agree with counsel for the state regarding the fact that once the court *a quo* convinced itself that no exceptional circumstances exist, the Court then dismissed the application and refused bail without any due regard to the grounds as referred to herein above. In fact, what the court *a quo* did was to only mention that it is enjoined to weigh up the grounds set out in *Section (60)(4)(e)* read with *Section 60(8A) (a)* to



(f) and left it at that. Neither did the court *a quo* consider nor weigh up any of those factors.

30. In *Nteleki v S*<sup>4</sup>, the court held that:

*“Where the facts in sections 60(4) and 60(9) of the CPA are relied upon in a bail application, they are relevant and cannot be ignored. In deciding the issue in question the court is obliged to have regard to, inter alia, the period the bail applicant has already spent in custody since his arrest as well as any financial loss which he may suffer as a result of his detention”.*

31. In view of the above, I find that the court *a quo* erred in failing to consider the facts that the Appellant raised in support of the grounds listed in Section 60(4), therefore, in my considered view, the magistrate exercised his discretion wrongly by failing to consider the grounds listed in Section 60(4)-(9) of the Act.

32. Section 60(4)(e) enjoins the court, in exceptional circumstances, to go further and determine whether:

*“There is the likelihood that the release of the accused will disturb the public order or undermine their public peace or security”.*

34. Similarly, the court in assessing whether the above is present, is enjoined to consider the following:

*“Section 60(8A)”*<sup>5</sup>

*In considering whether the ground in subsection 4(e) has been established, the court may, where applicable, take into account, the following factors, namely:*

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<sup>4</sup> (A156/2016) [2016] ZAFSHC 156 (19 August 2016) at para 12

<sup>5</sup> Criminal Procedure Act, 51 of 1977

- (a) *whether the nature of the offence or the circumstances under which the offence was committed it's likely to induce a sense of shock or outrage in the community where the offence was committed;*
- (b) *whether the shock or outrage of the community might lead to public disorder if the accused is released;*
- (c) *whether the safety of the accused might be jeopardised by his or her release;*
- (d) *whether the sense of peace and security amongst members of the public will be undermined or jeopardized by the release of the accused;*
- (e) *whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or*
- (f) *any other factor which in the opinion of the court should be taken into account”.*

35. The above is best determined by having regard to the Appellant's grounds of appeal regarding his contention that the court *a quo* incorrectly held that he failed to discharge the onus resting upon him to adduce evidence of exceptional circumstances which in the interest of justice, permits his release on bail. In support of this contention, counsel for the Appellant argued that in arriving at this finding, the magistrate simply dismissed factors submitted by the Appellant which he relies upon as exceptional circumstances as common place circumstances.

36. In her judgment, the magistrate states that “*exceptional circumstances must be something out of the ordinary. Something that is not commonplace.*”

37. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*<sup>6</sup> the Constitutional Court, per Kriegler J, had the following to say regarding what constitutes “exceptional circumstances”:

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<sup>6</sup> 1999 (4) SA 669 at para 75 and 76

[75] *"In this regard, I am not persuaded that there is any validity in the complaint raised in argument that the term 'exceptional circumstance' is so vague that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. The contention was moreover that if one adds that those circumstances must 'in the interests of justice permit . . . release', the subsection becomes an insurmountable obstacle in the way of bail. In my view the contrary is true. Inasmuch as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection that the requirement is constitutionally bad for vagueness falls to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional".*

[76] *"Likewise I do not agree that, because of the wide variety of 'ordinary circumstances' enumerated in ss (4) to (9), it is virtually impossible to imagine what would constitute 'exceptional circumstances', and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated. Under the subsection, for instance, an accused charged with a schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case. Other examples are readily to hand in the small body of case law that has already been established in the short period since the 1997 amendment came into operation on 1 August 1998. Thus, an otherwise dependable man charged with*

*consensual sexual intercourse with a fifteen-year-old girl, and who has a minor previous conviction dating back many years, would technically fall within the ambit of ss (11)(a). Yet a prudent judicial officer could find those circumstances sufficiently exceptional to warrant bail, provided there were no other factors adverse to the grant. Schietekat on the other hand also falls under schedule 6 and ss (11)(a) (indecent assault on a child under 16 and previous convictions for the same offence), but in his case the test for exceptional circumstances produced the opposite answer. In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form<sup>i</sup>.”*

38. In *S v Liesching and Others*<sup>7</sup> the court held that:

*“The phrase is sufficiently flexible to be considered on a case-by-case basis, since the circumstances that may be regarded as ‘ordinary’ in one case may be treated as exceptional in another.”*

39. In *casu*, the Appellant’s contention is that his personal circumstances coupled with the fact that even the state conceded the fact that the state’s case against him is questionable, should have been considered as exceptional circumstances. He contends that he will deny the allegations against him at trial because he knows nothing about them. It is in view of the above that the Appellant contends that the magistrate misdirected herself in not considering the weakness of the state’s case against him as exceptional.

40. It is disconcerting that although the Appellant is charged with a serious offence of rape, the state did not present any evidence in support thereof. No J88 report had been presented at the bail hearing. Furthermore, in her opposing affidavit, the investigating officer states that the investigations are nearly complete and all that is outstanding is the DNA Report. She makes no mention of a J88 Medical Report.

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<sup>7</sup> 2019 (1) SACR 190 para 39

41. In *Levy v S (A77/2021) [2021] ZAWGG 162 22* the Court had this to say:

*The court a quo also found and correctly so in my view, that the duty of the court in a bail application is to assess the prima facie strength of the State's case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. The magistrate was alive to the fact that bail proceedings are not to be viewed as a full dress rehearsal for trial.*

42. Having regard to the above, I am of the view that the magistrate misdirected herself materially by not taking into account the weakness of the state's case against the Appellant even in circumstance where the state conceded such. The magistrate exercised her discretion to refuse bail wrongly and in the circumstance, this Court finds that the magistrate should have admitted the Appellant to bail.

43. Regarding the amount of bail that the Appellant can afford, counsel for the Appellant submitted that the Appellant can only afford an amount of R2000.00. Whilst it was submitted on behalf of the state that in light of the fact that the Appellant faces a serious charge, bail should be set at an amount of R5000.00

44. I am mindful of the fact that the Court should not set an amount of bail which is out of the Appellant's reach as same would be tantamount to denial of bail.

45. In the result, it is ordered as follows:

45.1 The appeal is upheld and the magistrate's refusal to grant bail is set aside and substituted as follows:

- a. The Appellant is granted bail in the amount of R3000.00 with the following conditions:
- b. The Appellant is to reside at number 8 W[...] Court, M[...] Village, Mitchells Plain, Cape Town;

- c. The Appellant may not have any direct or indirect contact with the complainant or any other state witness in this matter;
- d. The Appellant is to attend court on all remand dates.

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**MATLHAPE B**  
**ACTING JUDGE OF THE HIGH COURT**

**COUNSEL FOR THE APPLICANT:     ADV MHLANGA**

**INSTRUCTED BY:                     DE KLERK AND VAN GEND**

**COUNSEL FOR THE RESPONDENT:   ADV R UYS**

**INSTRUCTED BY:                     DPP**

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