



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A258/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 05 NOVEMBER 2024
SIGNATURE: [REDACTED]

In the matter between:

WILLIAM LOUIS WATKINS Jnr

First Appellant

WILLIAM L WATKINS Snr

Second Appellant

MARIA MAGDELENA WATKINS

Third Appellant

and

THE STATE

Respondent

The matter was heard in open court, and the judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 05 November 2024.

J U D G M E N T

Mazibuko AJ

Introduction

[1] This is a bail appeal against the judgment and order by the Regional Magistrates' Court, Benoni, wherein the court refused to remit the appellants on bail pending an outcome of their appeal.

Background facts

[2] The appellants were convicted on 19 May 2022 as follows:

Count 1: Contravening the provisions of section 3 of the Sexual Offences Act¹ (The Act) read with the provisions of section 51(1) of the Criminal Law Amendment Act² (The CLAA).

Count 2: Contravening the provisions of section 3 of the Act read with the provisions of section 51(1) of the CLAA.

Count 3: Contravening the provisions of section 5(1) of the Act.

Count 4: Contravening the provisions of section 5(1) of the Act.

¹ Act 32 of 2007.

² The Criminal Law Amendment Act, Act 105 of 1997.

Count 5: Contravening the provisions of section 18(2)(a) of the Act.

Count 6: Assault.

[3] On 11 July 2023, they were sentenced as follows:

- a) The first appellant was sentenced to life imprisonment in respect of counts 1 to 4 and 6, which were taken together for the purpose of sentencing and 10 years in respect of count 5.
- b) The second appellant was sentenced to 30 years imprisonment in respect of counts 1 to 4 and 6, which were taken together for the purpose of sentencing and 10 years in respect of count 5, effectively 40 years.
- c) The third appellant was sentenced to 30 years imprisonment in respect of counts 1 to 4 and 6, which were taken together for the purpose of sentencing and 10 years in respect of count 5, effectively 40 years.

[4] The first appellant has an automatic right of appeal, and his appeal was duly prosecuted.

[5] The second and third appellants applied for leave to appeal against the conviction and sentence. On 6 September 2023, leave to appeal was granted regarding the conviction and sentences imposed on counts 1 and 2. However, leave to appeal against the other charges was refused. The second appellant then petitioned the Judge President. His petition application was successful, and leave to appeal was

granted to the appellants against the conviction and sentences imposed with regard to all counts. The second appellant also prosecuted his appeal.

[6] The third appellant, accused 3 in the court a quo, has since passed away whilst in prison, serving her sentence.

[7] Regarding the appeal, the appellants have received a notice from the office of the Director of Public Prosecutions to file their heads of argument in the main appeal on or before 29 November 2024.

[8] After the appellants' successful petition, they brought a bail application pending the outcome of the appeal. The court a quo refused the application on 27 August 2024. Aggrieved by the refusal, they have now appealed against the court a quo's decision.

The court a quo's decision

[9] What was before the court a quo was whether the appellants have, on a balance of probabilities, proven that there are exceptional circumstances which, in the interest of justice, permit their release on bail pending appeal.

[10] The appellants, in summation, based their bail application on the following:

- a) Their petition was successful, and there are prospects of success on appeal against conviction and sentence.
- b) They were on bail before their conviction and religiously attended court. After conviction, their bail was extended, and they continued to attend

court for more than a year until it was cancelled. Therefore, they are not flight risk.

[11] In refusing bail for the appellants, the court *a quo* found that the court that granted the petition on merits and sentence should have also considered the bail issue.

Assertions

[12] On behalf of the appellants, it was submitted that in none of the charges, the state alleged that the accused acted together to further a common purpose. Therefore, the court *a quo* misdirected itself in finding all three appellants guilty of rape of a minor child.

[13] The court *a quo* committed a material irregularity by sentencing the first and second appellants on count 6, as count 6 was not put to either of them, nor was any of them requested to plead on count 6. Count 6 was only put to accused 3. She was the only accused who had pleaded to it.

[14] It was argued that the court *a quo* erred when it found that it was not addressed on the prospects of success of the main appeal, for it was privy to the application for leave to appeal that was argued before it. It was also advised that the petition of the second appellant on both the conviction and sentence was successful.

[15] The respondent conceded that the prospects of success play a role in determining the bail pending appeal. It was pointed out that, on behalf of the

respondent, regarding the admissibility of evidence of the child witness, another court may conclude that a different approach than that adopted by the trial court should have been followed. Alternatively, the approach by the trial court was incorrect, which would render the complainant's evidence inadmissible, potentially vitiating the proceedings.

[16] On the other hand, it argued that granting the petition does not guarantee that the appeal will be successful. The appellants were granted leave to appeal regarding counts 1 and 2 because the court *a quo* believed another court might find the appellants guilty of a competent verdict, not that they would be acquitted. The respondent submitted that due to the considerations it had alluded to and its concession on the possibility of appellants succeeding, it cannot persist in opposing the bail appeal.

Issues

[17] The issue before this court is whether the court *a quo* was correct to refuse the bail application pending the outcome of the appeal. Whether it exercised its discretion judicially and correctly in denying the bail.

Legal principles

[18] Section 65(4) of the Criminal Procedure Act³ (The CPA) reads:

'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.'

³ Act 51 of 1977.

[19] Before the appeal court can intervene with the ruling of the *court a quo*, it is imperative that the court must ascertain that the decision rendered by the *court a quo* was erroneous. See *State v Botha en ander*.⁴

[20] Section 60(11) (a) of the CPA stipulates:

'(11) 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 exceptional circumstances exist which in the interests of justice permit his or her release.'

[21] In *S v Petersen*,⁵ on the meaning and interpretation of 'exceptional circumstances,' the full bench stated as follows:

'Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.'

Discussion

[22] It was common cause that one of the offences, counts 1 and 2, preferred against the appellants, fall within the confines of Schedule 6, and section 60(11)(a) of

⁴ 2002 (1) SACR 222 (SCA).

⁵ 2008 (2) SACR 355(c), para 55.

the CPA is applicable. The appellants are required to prove on a balance of probabilities that there are exceptional circumstances which, in the interest of justice, permit their release on bail pending appeal.

[23] In summation, the following was undisputed evidence regarding the appellants' circumstances presented before the court *a quo* by way of the appellants' respective affidavits. Among others, it was that the appellants:

- a) do not have any other previous convictions except the current ones or any other outstanding cases against them. The matter had been pending since 2017, when investigations continued. However, they religiously attended the lengthy court proceedings after they were granted bail in 2020. After their conviction, their bail was extended. For more than a year after the extension, they attended court until it was cancelled by the court *a quo*. They complied with all bail conditions and submitted that they would again do so should they be successful in their bail application.
- b) have strong family and emotional ties in the jurisdiction area of the trial court. They were raised and grew up in the Benoni area, where they remained until their incarceration. They have fixed addresses, and they will return to their place of residence where they were before their imprisonment. The investigating officer confirmed such addresses when they were initially granted bail before conviction. They had suffered immense hardship for the third accused (the wife of the second appellant and the mother of the first appellant) since her passing in prison.

- c) are not flight risks as their family, relatives, and support are also in the jurisdiction area of the trial court. They do not have any travel documents and do not intend to apply for same. Further, they have not threatened or intimidated any state witnesses throughout the trial. They were gainfully employed in the jurisdiction area of the trial court for many years and will rejoin their places of employment if granted bail.
- d) have prosecuted their appeal, but it will probably only be heard next year as the notice requires them to file their heads of argument by November 2024.

[24] It was submitted that the second appellant has fixed and movable property, whilst the first has only movable property in the jurisdiction area of the trial court. The community will welcome them back and not uproar if bail is granted pending appeal.

[25] The court *a quo* was required to conduct a careful judicial enquiry as to the existence of exceptional circumstances. All the aspects raised by the appellants must be collectively examined to determine the correctness of the decision made by the court *a quo*. Should this court establish that the court *a quo*'s decision was accurate, there would be no need to reassess the bail application.

[26] It is imperative to mention that the constitutional presumption of innocence until proven guilty is no longer available to the appellants, as they were already convicted. Ordinarily, the appellants would be detained pending the appeal unless compelling reasons have been presented before the court to secure their release on bail. As a

result, the appellants must substantiate, through evidence, that the cumulative effect of their circumstances and other relevant factors amount to exceptional circumstances. These circumstances, if proven, must be of such magnitude that they warrant their release in the interest of justice.

[27] The court *a quo* on page 65, line 24 of the record, found:

'In the current case, both applicants tick most of the boxes, if one looks or apply as standard whether the accused could bail or not, but I must point out that paragraph h is more problematic, because accused are already serving sentence which is heavy.'

[28] On page 68, lines 3 to 7, when in its judgment was considering the caselaws dealing with bail pending appeal, including that of *Rhode v The State* (SS43/2017)[2021] ZAWCHC 221). The court *a quo* again mentioned that all boxes could be ticked in favour of the appellants. Its concern was that the appellants had not 'placed on record before it to consider specifically the question of prospects of success.'

[29] On page 68, line 21, the court *a quo* went on to say:

'Probably the appropriate forum that might have considered prospects of success is the court that considered the petition.'

[30] On page 70, line 3, the court *a quo* concluded: *'In conclusion, I personally am not refusing bail, but the important fact relating to prospects of success was not drawn to my attention, and I find that the court which granted leave to petition, is an*

appropriate forum, which could find or has found prospects of success to grant bail.'
(sic).

[31] According to the bail application record, especially the court *a quo*'s judgment, it can be accepted that the court *a quo* assessed the appellants' circumstances and found that the cumulative effect of their circumstances and other relevant factors amount to exceptional circumstances, as it found the appellants ticked all the boxes regarding bail pending appeal. I find that was a justified evaluation for consideration of bail pending appeal since the court *a quo* had an opportunity to hear and evaluate the evidence preferred before it.

[32] If one accepts that the court *a quo*'s evaluation of the appellants' circumstances was correct, concluding that they ticked almost all the boxes. One is then left with the question of the prospects of success on merits, as pointed out by the court *a quo*. The court *a quo*'s reason for not remitting the appellants on bail seems to be that the High Court, when granting the petition, should have also addressed the position of bail pending the appeal, for the High Court dealt with the merits of the appeal, which, it stated, were not canvassed before it. With respect, I cannot agree in this regard. My viewpoint is that the court *a quo* misdirected itself. The record shows that the appellants' leave to appeal application was argued before the court *a quo*. It considered and granted leave regarding counts 1 and 2, on a consideration that another court might find the appellants guilty of competent verdicts instead of rape.

[33] It was incumbent on the court *a quo* to evaluate all the factors and circumstances as presented before it and decide to either accept them as exceptional

circumstances or reject them as not. The fact that the appellants' petition application was successful did not mean that the court *a quo* had no role in deciding that specific issue regarding the bail application it heard. The issue of bail pending appeal was not before the court which granted the petition. I could find no grounds for the court *a quo*'s election not to determine concerning bail application whilst relying on the fact that the High Court who granted the petition should have also considered bail. I view this approach as a misdirection on the part of the court *a quo*.

[34] On behalf of the respondent, it was conceded that another court might consider the admissibility of the single child witness' evidence differently when regard is had to the provisions of section 164 of the CPA. A different approach than that followed by the court *a quo* in admonishing the child witness to speak the truth could have been followed. Though submissions regarding this issue were made before me during the bail appeal hearing, I find no need to deal with it as it is to be debated during the appeal hearing.

Conclusion

[35] The court *a quo* found that the appellants had ticked most of the boxes to be released on bail pending their appeal. It can be accepted that it was found that there were exceptional reasons for securing the release of the appellants on bail.

[36] In *S v DV*,⁶ an unreported case, Judge Legodi, as he then was, found:

⁶ 2012 (2) SACR 4492 (GDP).

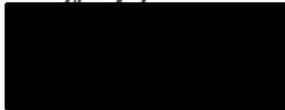
'cumulatively the fact that the state's case was subject to some doubt, the low risk pertaining to flight, the absence of likelihood of interference with the state witness and the low risk of re-offending, constituted exceptional circumstances.'

[37] In considering the factors, as elucidated in the appellants' affidavits cumulatively and having considered the court *a quo*'s reasons for refusing bail as well as its concern that the appellants had not explicitly placed on record before it for consideration, there were no extraordinary circumstances existed, which, in the interest of justice, necessitated the appellants' release on bail. Instead, he concluded they ticked almost all the boxes, except for the prospects of success issue, which I have already dealt with. The circumstances and factors favour the appellants because they constitute and possess exceptional attributes. Accordingly, I am persuaded that the decision of the court *a quo* to deny bail to the appellants was not properly made. Consequently, the bail appeal must succeed.

[38] As a result, the following order is made;

Order:

1. The appeal is upheld.

N G M MAZIBUKO

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing:	25 October 2024
Judgment delivered:	05 November 2024

APPEARANCES:

For the Appellant:	Mr M Van Wyngaardt
Attorney for the Applicant:	Willem Stijn Attorneys

For the Respondent:	Ms E Mafunisa
Attorney for the Respondent:	State Attorney