

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

CASE NO: A34/2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES

DATE 14-04-2025

SIGNATURE PD. PHAHLANE

In the matter between:

MAHLATSI SAMUEL MOKGETSI

APPELLANT

and

THE STATE

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 14 April 2025.

Judgment – Bail Appeal

PHAHLANE, J

[1] This is an appeal against the judgment of the Learned Magistrate Mrs De La Rey, sitting at Welbekend District court, in which the court dismissed the appellant's application to be released on bail pending his trial.

[2] It is common cause that the appellant was charged with one count of rape. At the commencement of the bail hearing before the magistrate, the State and the defence agreed that the bail application fell within the ambit of Schedule 5 of the

Criminal Procedure Act¹ (“CPA”) and had to be dealt with in terms of section 60(11)(b)². This section saddles the appellant with the onus to prove on a balance of probabilities that it is in the interests of justice that he be released on bail, failing which he must be detained in custody.

- [3] The question to be determined in this appeal is whether the appellant has discharged the burden placed on him by 60(11)(b) of the CPA to be admitted to bail and whether the magistrate has indeed erred and exercised her discretion to refuse bail wrongly.
- [4] The jurisdictional requirement for the appeal court to interfere with the decision of the magistrate is set out in Section 65(4) of the CPA which reads as follows:

“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”.

- [5] The appellant was legally represented at the bail hearing before the magistrate. He presented his evidence in the form of an affidavit and placed the following circumstances before the court:

5.1 He is 20 years of age.

5.2 The appellant resides at F[...] Avenue, Plot [...].

- It is not indicated in the appellant’s affidavit in which area this Plot is situated, but he stated that his alternative address is 1[...] M[...], Extension 46, Daveyton, where he will be residing until the matter is finalised.

5.3 He is employed at Victus Bio (Pty) Ltd.

5.4 He has no pending cases nor previous convictions.

¹ Act 51 of 1977

² The section provides: “Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, but not 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 the interests of justice permit his or her release”.

- 5.5 In compliance with section 60(4) of the CPA, the appellant undertook that should he be granted bail, he will not endanger the safety of any person or the public and will not disturb public order; he will not commit any Schedule 1 offence; will comply with all bail conditions; will not influence or intimidate state witnesses or 'interfere' with the complainant.
- 5.6 The appellant indicated that he is not a flight risk and undertook to attend court at all times and stated that he does not have any travelling documents. He further indicated that he would lose his employment if bail is denied.
- 5.7 He submitted in his affidavit that he 'was arrested in his room while sleeping, and he will plead not guilty during his trial'.

[6] In opposing the bail application, the State relied on the affidavit of the Investigating officer, Sergeant Mogothe wherein she stated, amongst other things, that the appellant is originally from Limpopo and his address is unknown, but that his alternative address has been verified. A brief summary of facts which can be gleaned from this affidavit is that:

- 6.1 The complainant was at her place of residence sleeping and had properly locked all windows and doors before going to bed. While still asleep, she was awoken by the accused who was on top of her. The accused had apparently switched on the torch and hit the complainant with a fist on her face and took the cooking oil from the cupboard and poured it over the complainant from her waist downwards. The complainant tried to fight him, but she was overpowered.
- 6.2 The accused took her to a sofa next to the bed and put his penis inside her vagina and penetrated her.... He then fell asleep on top of the complainant, and she managed to remove him and went to her neighbour for help.
- 6.3 When she returned to her room, she hit the accused with a stick on his face and recognised who he was. The accused woke up and ran away. The police were called, and the accused was then pointed out by the complainant and arrested. He had blood stains on his face and on his All-Star sneakers which the complainant had told the police about.

- 6.4 It is further noted that the accused gained entry through the cracked door at the complainant's residence – which is at her workplace. It is alleged that the accused knows the complainant's place very well because he once worked in that area and as such, the complainant does not feel safe and has been traumatized.
- 6.5 The accused's alternative address in Daveyton is not very far from the complainant's place of residence.

[7] The appellant contends that the magistrate erred in denying him bail on the basis that he was charged with a prevalent offence, and on what the magistrate referred to as a "disposition of violence on the part of the accused as is evidence from his past conduct in terms of section 60(5)(d) of the CPA".

[8] Mr Kgagara submitted on behalf of the appellant that the magistrate misdirected herself in refusing to admit the appellant to bail because her decision was based on conjecture and speculation. This submission is based on the following remarks made by the magistrate in her judgment:

"The court can find that based on the actions of the accused, females in general may be in danger and this court must obey the law and judge the accused's liberty interests against the interests of society and guard against the potential that someone else might get seriously injured or even worse by this person who showed so much violence and cruelty in the commission of this offence. That is a chance this court will not take, and it is not in the interests of justice to release a person back into society under these circumstances".

[9] On the other hand, the State (the respondent) submitted that the magistrate took all the factors placed before the court into consideration and did not misdirect herself.

9.1 Relying in the decision of **S v Barber**³ the respondent submitted that the magistrate was not wrong in exercising her discretion because the release

³ 1979 (4) SA 218 (D) at 220E-F

of the appellant on bail is not in the interest of justice for the following reasons: **(1)** the offence with which the appellant has been charged with is of a serious nature and has a prescribed minimum sentence, **(2)** that the court found more than one factor as stipulated in section 60(5) which the court had to take into account when considering the grounds in subsection (4)(a).

9.2 In this regard, the respondent avers that the factors stipulated in subsection (5)(a)(b) and (f) of the CPA were more relevant in determining whether it was in the interest of justice to permit the appellant to bail.

9.2.1 With regards to the degree and threat of violence as noted in paragraphs (a) and (b), the respondent submitted that the magistrate took into account that there was violence used because it appears from the record that the complainant was assaulted with fists on the face before the rape, hence the magistrate's questions posed to the prosecutor and the affirmative response thereof. It was placed on record before the magistrate that some of the injuries noted on the J88 are consistent with the assaults I referred to above.

9.2.2 The respondent argued that this aspect of violence was never disputed before the magistrate, and it was as such important for the court *a quo* to take it into consideration as required by subsection (5)(a) and (b).

9.2.3 With regards to paragraph (f) relating to the prevalence of a particular type of offence, the respondent submitted that the offence of rape is prevalent in the country and that the magistrate did not misdirect herself by having regard to the crime statistics and the fact that gender based violence (GBV) is on the increase and was even declared by the President to be a pandemic.

9.2.4 The respondent further submitted that this court should take judicial notice of the current sexual offence perpetrated on a minor which has led the entire country to be up in arms in a fight against rape cases and GBV which has escalated at an alarmingly high rate.

9.3 Furthermore, the respondent submitted that rape is of such a serious nature that if the court easily releases the perpetrators on bail, there may

be a sense of shock in the community, not only where the offence was committed but in communities faced with the scourge of sexual offences and GBV. Further that the release of the appellant on bail under unsuitable circumstances such as the present, will undermine and jeopardize public confidence in the criminal justice system, and put the administration of justice into disrepute.

- [10] It should be noted that in a bail application, the enquiry is not primarily concerned with the question of the guilt of the accused. The focus at the bail stage is to decide whether the interest of justice permits the release of the accused pending trial. Usually, bail will be denied to protect amongst other things, the investigation and society against the possible future life-threatening criminal acts of an accused.
- [11] In applying the “interests of justice” criterion, there is no doubt that the trial-related factors such as the strength of the State's case and the severity of the crime must be taken into account in determining where the interest of justice lie – for the purpose of section 60(11)(b). This criterion requires a weighing up of the interest of the accused's liberty, against those factors which suggest that bail be refused in the interest of society⁴.
- [12] Reading through the judgment of the magistrate, there is nothing which suggest that the magistrate misdirected herself because the factors stipulated in subsection (5)(a)(b) and (f) as highlighted by the respondent were taken into consideration. The magistrate correctly stated that the court needs to find a balance between the liberty interests of the appellant and the interests of society in determining whether it would be in the interest of justice to grant bail to the appellant. The magistrate did this by making a value judgment based on the information and the evidence placed before the court, as well as the strength of the State's case, while also considering whether the appellant will evade trial if released on bail.

⁴ S v Dlamini; S v Dladla and others; S v Joubert: S v Schietekat [1999] ZACC 8; 1999 (2) SACR 51 (CC)

[13] Having regard to what I noted in the preceding paragraph, I do not agree with the appellant's submission that the magistrate's decision was based on speculation and conjecture. It appears from the judgment that in considering the degree of violence used on the complainant as required by subsection (5)(a) and (b), the magistrate also made reference to paragraph (d) which relates to a "disposition of violence on the part of the accused from his past conduct".

13.1 There is no evidence on record that the appellant had previously conducted himself in a violent manner. This does not however mean that all the other factors which were correctly considered by the magistrate should be ignored or disregarded.

13.2 Be that as it may, one of the aspects which the magistrate took into account is the fact that the appellant's alternative address where he will be residing if admitted to bail, is not far from the complainant's place of residence where the offence took place.

[14] The magistrate found that the appellant had failed to prove on a balance of probabilities as required by section 60(11)(b) that the interests of justice permit his release on bail. An analysis of all the evidence before the magistrate supports this finding, and I cannot find any fault with this conclusion. Accordingly, I am of the view that the magistrate's decision to refuse to grant bail to the appellant was the correct one. I am also satisfied that the magistrate properly exercised her discretion properly in refusing bail.

[15] As indicated above, the powers of an appeal court to interfere with the magistrate's decision to refuse bail are circumscribed by section 65(4) of the CPA. This court as the court of appeal can only set aside such a decision if it is satisfied that it is wrong. It should also be noted that even if this court has a different view, it shall not substitute its own view for that of the magistrate who

properly exercised her discretion. This principle was expressed by the court in **S v Barber**⁵ as follows:

“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 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”.

[16] It was also argued on behalf of the appellant that the magistrate disregarded the appellant’s right to be presumed innocent when she refused to admit the appellant to bail. I agree that the appellant has the right to be presumed innocent until proven otherwise, but the right referred to is not absolute. If the court were to readily conclude that the rights of every suspect in detention are limited by the refusal of bail, this may open flood gates and defeat the purpose which the legislature had in mind when promulgating section 60(11) of the CPA. In **Mafe v S**⁶ the court stated the following regarding the presumption of innocence:

“The presumption of innocence is one of the factors that must be considered together with the strength of the State’s case. However, this right does not automatically entitle an accused person to be released on bail.... In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society”.

⁵ 1979 (4) SA 218 (D) at 220E-F

⁶ [2022] ZAWCHC 108 at para 95 (31 May 2022); See also: S v Mbaleki and another 2013 (1) SACR 165 at para 14 (KZD)

[17] In light of the above, I am not persuaded that the magistrate erred in refusing to admit the appellant to bail when regard is had to the facts presented having been considered against the authorities cited above. I am satisfied that the magistrate properly exercised her discretion, and it is my considered view that releasing the appellant on bail under these circumstances would not be in the interests of justice as it is likely to seriously undermine the criminal justice system including the bail system itself. I therefore cannot find any basis to interfere with the decision of the magistrate. Similarly, I concur with the magistrate's finding that the appellant failed to satisfy the court that the interests of justice permit his release.

[18] In the premises, the following order is made:

1. The appeal is dismissed.

PD. PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant	: Mr Kgagara
Instructed by	: Legal Aid South Africa
Counsel for the Respondent	: Adv. Mafunisa
Instructed by	: National Director of Public Prosecutions, Pretoria
Heard on	: 03 April 2025
Date of Judgment	: 14 April 2025