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THE REPUBLIC OF SOUTH AFRICA



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

Bail Appeal No: A 03 / 2025

In the matter between

N[...] G[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: Wille, J

Heard: 19 March 2025

Delivered: 15 April 2025

JUDGMENT

WILLE, J

INTRODUCTION

[1] The appellant stands indicted on a single charge of rape, alternatively on a charge of sexual assault as it is now broadly defined by way of legislative intervention.¹

[2] The charge concerns an alleged incident between the appellant and the appellant's stepdaughter, which is said to have occurred about eleven (11) years ago.²

[3] It is not disputed that given the nature of the case and the charges as preferred by the prosecution, the appellant was obliged to adduce evidence that satisfied the court that exceptional circumstances existed that permitted his release from custody on bail in the interests of justice.³

GROUND OF APPEAL

[4] The arguments raised in support of the appeal are that the trial court erred in finding that:

- (a) There was a likelihood that the appellant would evade his trial.
- (b) There was a likelihood that the appellant would interfere with the state witnesses.
- (c) There was a likelihood that the appellant would interfere with the investigation.
- (d) There was a likelihood that the appellant would commit further crimes.

¹ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007.

² During 2014.

³ Section 60 (11) (a) of the Criminal Procedure Act, 51 of 1977 (A "Schedule 6" offence).

- (e) The respondent had a good case against the appellant.
- (f) The appellant failed to prove exceptional circumstances to secure his release on bail.⁴

OVERVIEW

[5] The respondent placed evidence before the court in the first instance by using an affidavit from the investigating officer. It was alleged that the appellant had committed an act of digital (finger) penetration against his stepdaughter, who was fourteen (14) years old at the time. It is further noted that the appellant had another pending matter for allegedly committing another similar offence against the younger sister of the current complainant.⁵

[6] The complainant did not report the matter at the time of the alleged incident. However, when her younger sister reported that the appellant had allegedly committed a similar act of digital penetration against her, this gave her the courage to report what the appellant had allegedly done to her when she was a young child.⁶

[7] The appellant testified, and during his cross-examination, documentary evidence was introduced concerning a medical examination of the complainant that may indeed support her allegations regarding the type of sexual assault that she allegedly endured. What I found of great significance was the evidence that emerged that the current wife of the appellant (the mother of both victims) had allegedly influenced one of the victims to withdraw a protection order, which was granted against the appellant in connection with his alleged deviant conduct.⁷

⁴ This remains the ultimate consideration to be determined in the court of first instance.

⁵ The appellant is on bail in this matter.

⁶ This factual position was not disputed.

⁷ This factor weighed heavily with the judicial officer in the lower court.

CONSIDERATION

[8] Before I can determine whether bail should have been refused or granted to the appellant, I must determine whether a misdirection occurred by the judicial officer in the lower court. This misdirection, if it exists, must also have been material in relation to the facts or the law, or I suppose in rare cases both.⁸

[9] The appellant's primary argument is that the lower court misdirected itself by over-emphasizing the strength of the prosecution's case against him. Ultimately, the trial court must determine this after the conclusion of the trial. This notwithstanding, it remains only one of the factors that the court of first instance must consider when deciding whether bail should or should not be granted.⁹

[10] What bears scrutiny is why the appellants advance that the prosecution has a weak case against the appellant. The reasons advanced are these:

- (a) There was a delay in reporting the matter to the police.
- (b) There was some lack of clarity as to the precise nature of the offence.
- (c) The appellant's hypothesis of a motive for a false fabrication against him.¹⁰

[11] The court of first instance had to, among other things, determine on a weighing up of the available evidence before it whether it was legally entitled to conclude that the prosecution had a sufficient and adequate *prima facie* case against the appellant.¹¹

⁸ Panayiotou v S (CA&R 06 /2015) [2015] ZAECGHC 73 (28 July 2015) at paragraph [27].

⁹ This is not an issue that is easily determined at this stage of the proceedings.

¹⁰ These allegations were meticulously dealt with in the lower court.

¹¹ The lower court did deal with these allegations.

[12] To assist the court of first instance in this weighing-up process, the appellant was required to adduce convincing evidence to establish that the case against him was weak or that he was likely to be acquitted. The respondent submits that the appellant failed to adduce any evidence to establish that the case by the prosecution against him was and is a poor case.¹²

[13] As I have said, although this was an issue that was pursued by the appellant in the court of first instance and again during these proceedings (and considered by the presiding judicial officer), it is not a factor which is definitive to the outcome.¹³

[14] Inextricably linked to this argument is the allegation by the appellant that the complainant in the pending rape matter is falsely accusing him as she has a boyfriend with whom she is in a sexual relationship. This bears scrutiny as these charges were preferred against the appellant before this information surfaced.¹⁴

[15] These ‘fabrication’ allegations must also be viewed against the canvass of the valid admission of similar fact evidence in the court of first instance. As a general proposition in bail applications, the common-law rule excluding similar fact evidence or the propensity to commit certain types of crime must be disregarded in light of the view that during a bail enquiry, the appellant’s past conduct may be highly relevant as a factor determining risk, or as in this case, whether the appellant is likely to interfere with any of the witnesses for the prosecution.¹⁵

[16] By legislative intervention, in this case, the appellant was compelled to inform the court whether any charges were pending against him or her and whether he or she had been released on bail regarding those charges.¹⁶

¹² The appellant case was mainly based on speculation by him.

¹³ This decision is incredibly difficult (if not impossible) to make at this stage of the proceedings.

¹⁴ At best, this is speculative for the appellant.

¹⁵ S v Patel 1970 (3) SA 565 (W).

¹⁶ Section 60 (11B) of Act 51 of 1977 (as amended by Act 85 of 1997).

[17] In this case, the appellant is facing similar charges and has been released on bail pending the determination of those charges. Thus, in this case, the primary interest which needs to be protected is the risk of interference with the witnesses for the prosecution and how this is assessed, considering the elusive concept of the proper administration of justice.¹⁷

[18] The appellant, in this case, allegedly persuaded his current wife (the mother of both victims) to influence one of the victims to withdraw a protection order, which was granted against the appellant in connection with similar alleged deviant conduct. Thus, the appellant has already allegedly interfered with the administration of justice.¹⁸

[19] In this case there exists, at the very least, a well-grounded fear of interference of the witnesses for the prosecution by the appellant. I say this also because of the familial relationship between the appellant and the complainant. Put in another way, there is a reasonable possibility that the appellant will continue to interfere with the witnesses for the prosecution because the complainant is his stepdaughter.¹⁹

[20] The respondent submitted that the appellant's circumstances did not demonstrate anything unusual or exceptional. It was not shown that the appellant would suffer any undue hardship if bail was not granted to him. The appellant's circumstances were not exceptional in the legal sense to warrant his release on bail.²⁰

[21] I say this because the appellant alleged that caring for his ex-wife was an exceptional circumstance to his advantage. The respondent alleged that the appellant's ex-wife had recently passed away, and the appellant's legal representative confirmed her passing. Besides, the appellant did not allege that he was financially supporting his ex-wife as she had received a disability grant.²¹

¹⁷ S v Vankathathnam 1972 (2) PH H139 (N).

¹⁸ R v Phasoane 1933 TPD 405.

¹⁹ R v Fourie 1947 (2) SA 574 (O).

²⁰ The judicial officer in the lower court engaged with this issue.

²¹ The issue of the alleged financial support was not fully traversed by the appellant.

[22] Finally, turning to the often debated and undefinable term known as the interests of justice. In the context of this species of bail application, it has been suggested that the term 'interests of justice' should be read to mean the 'interests of society' as a whole. This seems problematic as no judicial interpretation of the term 'interests of society' would be capable of rendering it a 'provision' that gives any guidance for legal debate.²²

[23] Instead, a court must weigh up the interests of the appellant against the interests of society as prescribed by the provisions of the intervening legislation when dealing with an application for the release under bail under these circumstances.²³

[24] I say this also because bail applications are unique proceedings. A bail application is not a trial. The appeal to this court must strictly follow the intervening legislation dealing with applications of this nature, which provides 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...'*²⁴

[25] Put another way, it does not matter what my views are, as the only question is whether it can be said that the judicial officer in the lower court who had the discretion to grant bail exercised that discretion incorrectly. I cannot conclude that the lower court's judicial officer was wrong when weighing up the appellant's circumstances against the seriousness of the charges against him and the interests of society. Thus, the finding that the appellant did not provide any exceptional circumstances causing it to be in the interests of justice to grant him bail was not wrong.²⁵

²² R v Morales (1992) 777 CCC (3d) 91 (SCC). (Canadian Authority).

²³ With reference sections 60(4), 60(9) and (10) of the Criminal Procedure Act, 51 of 1977.

²⁴ Section 65(4) of the Criminal Procedure Act, 51 of 1977.

²⁵ S v Barber 1979 (4) SA 218 (D) at 220 E-H.

[26] Finally, I am not permitted to interfere with the judicial discretion exercised by the lower court because this decision was correctly based on a cumulative analysis of the evidence, which demonstrated that the appellant did not discharge the legal onus which rested on him in the circumstances. Thus, the appeal must fail.

ORDER

[27] The appeal is dismissed.

E.D. WILLE
(Cape Town)