

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

CASE NO: A249/25

In the matter between:

K[...] C[...] D[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: **GXASHE AJ**

Heard: 06 FEBRUARY 2025

Delivered: 18 FEBRUARY 2026 (delivered electronically to the parties)

Summary: Bail – Appeal against refusal of bail- factors to be taken into account- exceptional circumstances- section 60 (11) (a) of the Criminal Procedure Act 51 of 1977- onus on the Applicant- to prove exceptional circumstances- which in the interests of justice warrants the appellant's release on bail-expert evidence- speculation- section 60(4) a-e, (5) (9) Criminal Procedure Act-balancing exercise between the accused right to his personal freedom and interests of the society- attaching bail conditions-appeal upheld - Section 60(2A) of the Criminal Procedure Act 51 of 1977- is intended as an information-gathering procedure, not a preview of the trial, and the bail court should not conduct a "mini-trial" by over-analysing State evidence as this usurps and encroaches on the trial court's role- function of the trial court to determine the sufficiency of the evidence-

ORDER

Appeal upheld

JUDGMENT

GXASHE AJ

Introduction

[1] This is an appeal against a judgment of the Bellville Magistrates' Court which dismissed the Appellant's application to be released on bail. The Appellant is charged with two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, both read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, and one count of assault with intent to do grievous bodily harm. In respect of both count one and two, the State alleges that on or about March 2025 the Appellant committed an act of sexual penetration with a nine-year-old girl, CG, the daughter of the complainant in count 3 by inserting his penis in her anus. In respect of count 3, the allegation is that the Appellant assaulted NG on her face as a result of which her teeth fell out.

[2] On 9 April 2025, the Appellant brought a bail application for his release from detention which was opposed by the State. His application was dismissed. He now appeals against that decision in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the Act").

[3] The following documents were admitted on record by agreement between the parties:

- (a) The photos depicting NG's face as Exhibit A.

- (b) The protection orders dated 31 May 2005 as exhibit B and D respectively.
- (c) WhatsApp messages between the Appellant and NG as Exhibit C.
- (d) The investigating officer's affidavit as Exhibit E.

[4] The Appellant, in the Magistrates' Court, was legally represented by Mr. Florence, an attorney of the High Court of this Division. On appeal to this Court, Advocate Jose appeared for the Appellant, while the respondent was represented by Advocate September-Qatana.

[5] During the bail application, both parties agreed that section 60(11)(a) of the Act was applicable, in that the application fell under the purview of Schedule 6 of the Act.

The Appellant's case

[6] During the bail application, the Appellant testified under oath and stated that he is a 26-year-old single adult male. Before his arrest, he was residing at number [...] P[...] Street, Mitchells Plain, with his mother and stepfather for three years. He is blessed with one child who is residing with his mother in Paarl but did not have regular contact with him due to distance and financial constraints. The Appellant was employed at the Cape Town under the auspices of Teleperformance Centre for a year, earning a sum of R5000 per month. At the time, he was involved in a love relationship with NG, CG's mother for 10 months. He shared a common home with them in Delft for the duration of their relationship. He, however, broke up with NG because they argued on a regular basis and she was jealous of his progress.

[7] The Appellant denied the allegations against him and insinuated that NG made false allegations against him because he never made contact after he broke up with her. He further asserted that he will not interfere with the State witnesses and/or even attempt to destroy the evidence the State intends to use against him if he is released on bail. He will stand his trial, abide by the bail conditions and the

terms of the protection orders. He is a holder of a passport and will hand it in to the investigating officer should he be ordered to do so.

[8] In cross examination, it became clear that he is not maintaining his son on a regular basis and only does so when his budget allows. He did not give a definite answer about his knowledge of the protection orders which were granted in favour of NG and CG, except for disputing the allegations against him. He then closed his case without calling any other witnesses.

The respondent's case

[9] NG testified and confirmed in evidence that she was involved in a love relationship with the Appellant. They shared a home in Delft, but after she broke up with him, he moved out. NG testified that on 22 March 2025 the Appellant assaulted her and broke her dentures. When he realised that she was bleeding, he apologised and promised to replace them. According to her, it was not the first time that the Appellant assaulted her, he made it a habit, especially when he was under the influence of alcohol. After the last incident, which occurred on 22 March 2025, she took photos, marked on the record as (Exhibit A), which depicts the injuries she sustained as a result of the assault.

[10] NG testified further that she approached the family court in Bellville for a protection order against the Appellant, as she lived in fear because of his aggressiveness, and the protection order was granted in her favour. She still fears for her safety and believes that if the Appellant is released from detention, he will intimidate her. She also testified that a protection order was also granted against the Appellant in favour of her child, CG, after the allegations of rape emerged. According to her, CG does not want to see the Appellant again.

[11] In cross examination, she reiterated that she broke up with the Appellant because of his abusive behaviour. According to her, after the assault, which occurred on the 22 March 2025, the Appellant apologised and made her promise that she would not report the incident to the police. NG also stated that she did not go to a medical doctor due to financial constraints. It is not clear why she did not go to a public clinic.

[12] It then transpired during cross examination that after the assault, NG had a WhatsApp conversation with the mother of the Appellant. NG told the Appellant's mother that she assaulted the Appellant with her phone and spat out her dentures and they broke. When she felt a pinch during cross examination, she stated that what she told the Appellant's mother was suggested by the Appellant. According to her, she contacted the Appellant's mother to request her to hail an uber for the Appellant because her mother was going to call the police.

[13] NG also confirmed in evidence that the photos which were admitted on record by agreement were captured by her after the alleged assault. She, however, conceded with the defence attorney that the said photos are not dated, and so it is difficult to determine whether she sustained those injuries as a result of the alleged assault.

[14] The State further read on record the affidavit deposed to by the investigating officer, Mr Ayanda Ndaba, in support of its opposition. In his affidavit, the investigating officer stated that the victim alleges that she was at home when the Appellant visited them. He asked to play with her and she refused. Subsequently thereafter, the Appellant touched her bum. Later, while she was asleep, she felt someone lying behind her and noticed that it was the Appellant. At the time she was naked, and the Appellant's penis was inside her private part. Two weeks later, the Appellant did the same thing.

[15] The investigating officer then confirmed the Appellant's personal circumstances as stated by the Appellant in his evidence. He further stated that the reason he was opposing bail is that the complainant on count one and one is a minor child who can be easily intimidated. The Appellant knows the victim's residential address and the State has a strong prima facie case against him. The affidavit was admitted and marked as Exhibit E.

[16] The court enquired if there was a J88 medical report and there was a discussion between the court and the parties. It transpired during this discussion that there was a J88 in the form of a medical report but there were no clinical findings. After the court's persistence, the State revealed that the doctor concluded that "the

lack of clinical evidence does not exclude sexual assault due to the lapse of time. Then the discussion proceeded as follows:

Court: if there were injuries and said "any potential injuries could have healed now.

Mr Florence: I do confirm your worship

Court: In the absence of saying not, we must think there is."

Mr Florence: I would be so brave enough to say that, that appears to be such a piece of writing in j88's, your worship

Court: This is the submission, her mother's ex-boyfriend raped her on multiple occasions by putting his fingers into the vagina and his penis into her anus. That is what a nine-year-old child told the medical professional

Mr Florence: I do confirm your worship, I then also the finding, your worship

Court: So, Mr Steward, you are going to have to help the court because all the other gynaecological parts of the body stayed intact except for the hymen. And except for the posterior rim, marginal edge of the hymen and configuration, there is a word here that the court cannot make out

Prosecutor: that is true, your worship. The state also looked what that word is your worship, but it is true that you say, it is not saying it is not intact. How can I put it the doctor did not say it is intact

Court: It is not according to this medical evidence, the hymen is not intact. It is something else. There is a word that the court cannot make out. Perhaps, Mr Florence, if you saw this word, would you be able to make this word out. Because if it were intact, it would say so.

Mr Florence: Intact your worship.

Court: if you have a look.

Mr Florence: Your worship, it is going to be an assumption, I cannot.

Court: The court cannot, but in the absence of the fact that everything else on that gynecological report says intact, but for the hymen and other areas. I do not know what that says.

Mr Florence: Your worship and then in my view, your worship, one would have to establish the meaning of this word or what it states, because of the conclusions, your worship. In line with everything else that is intact, your worship.

Court: Well the court cannot stretch that far.

Mr Florence: Thank you Your Worship

Court: The court is not going to stretch it that far, because the clinical findings is that the evidence does not exclude a sexual assault of this child.

Mr Florence: do confirm so Your Worship.

Court: And if we consider it is a nine-year-old child who very eloquently describes exactly what happened to her, the Court cannot ignore that either.

Mr Florence: Confirm so your worship.

Court: So this J88 is strong.

Mr Florence: At it pleases the court your worship.

Subsequent thereto, the state's case was closed.

Findings of the bail court

[17] The magistrate correctly found that the bail application fell under the purview of section 60(11)(a) of the Act, and that the Appellant must adduce evidence which satisfies the court that exceptional circumstances exist, which in the interests of justice warrant his release from detention.

[18] In her judgment, the magistrate doubted the Appellants' version and questioned his failure to mention in his evidence that NG assaulted him. The magistrate found that the offences are prevalent in our communities. She also found that the Appellant possesses a valid passport and will attempt to evade his trial. Furthermore, the magistrate found that the State has a strong prima facie case against the Appellant and, if convicted, he could be sentenced to life imprisonment. She further found that the Appellant will intimidate and attempt to influence the State witnesses, as is evident from the WhatsApp messages where he expressed suicidal thoughts.

Grounds of appeal

[19] The Appellant's grounds of appeal as set down in his notice of appeal can be summarised as follows. The magistrate misdirected herself in merely finding that:

- (a) The Appellant's circumstances do not constitute and/or meet the requirement of exceptional circumstances. The Appellant will follow through with this threat to commit suicide.
- (b) The J88 of the first complainant is strong, and that the State has a strong case against him.
- (c) The magistrate failed to specify which risk factors in terms of section 60(4)(a) - (e) are present and failed to deal at all in any manner whatsoever, with the said subsections.
- (d) The magistrate failed to consider the imposition of bail conditions to circumvent the propensity of the Appellant to commit a Schedule 1 offence or prevent him from interfering with witnesses.
- (e) The magistrate failed to consider the fact that the Appellant made no contact with the complainants since his breakup with the second complainant.
- (f) The magistrate misdirected herself in failing to even consider the Appellants' personal circumstances.
- (g) The magistrate misdirected herself in failing to consider at all that the duration of the investigation will take few months and that matters of this nature are ordinarily transferred to the regional court which has a serious backlog in the Western Cape.
- (h) The magistrate misdirected herself in law by failing all together to consider, let alone investigate the possibility of granting bail coupled with conditions.

Arguments

[20] At the hearing, counsel for the Appellant, Advocate Jose, did not argue his case but referred this Court to his heads of argument where he contended that the denial of bail has far reaching consequences both for the Appellant and his family. He submitted that, before his arrest, the Appellant was gainfully employed, and his detention has resulted in loss of financial stability. He is the father of a minor child and has a close-knit family which depends on him for financial support. According to him, the Appellant's detention resulted in his absence from their daily life for more than six months and has placed them under financial strain. The Appellant has been

residing with his parents in Mitchells Plain and even though he possesses a valid passport, he is willing to surrender it to the authorities should he be ordered to do so. He also has strong community ties in Mitchells Plain, which diminishes any likelihood that he might not stand his trial.

[21] According to the Appellant's counsel, the State's case is weak and rests primarily on the J88, which was not properly interpreted by the court a quo. The medical examination indicates inconclusive clinical findings. The anal and vaginal examination of the child indicated that everything was intact with no signs of penetration or injuries. Despite this, the magistrate concluded that the State has a strong case against the Appellant. Moreover, the magistrate reached this conclusion even though there was an ambiguous term which could not be interpreted on the medical report. He further argued that the magistrate refused bail on the basis that the Appellant threatened to commit suicide without sufficient evidence to support that conclusion. The Appellant is still alive and has no suicidal tendencies.

[22] It was also contended on behalf of the Appellant that the magistrate failed to consider the imposition of bail conditions to prevent the slightest possibility of the Appellant committing a Schedule 1 offence or interfering with the State witnesses. Counsel for the Appellant then submitted that the Appellant has no previous convictions or pending cases against him. He will not interfere with the State witnesses and the last time he had contact with them was when he and NG ended their relationship. According to him, the magistrate should have imposed appropriate bail conditions to ensure that the Appellant will not engage in any unlawful conduct.

[23] Counsel for the appellant submitted further that the magistrate also failed to consider the duration it would take to finalise the matter and the effect of the prolonged detention, not to the Appellant only but also to those who depended on him financially. In the end, he submitted that the Appellant will be able to afford to pay R2000.00 which will be paid by his mother.

[24] Counsel for the State, Advocate September, submitted that the Appellant did not argue in the court a quo that the State's case is weak but submitted that extensive consultation is needed with the Appellant to establish the basis of his

defence. He also did not provide any documentary evidence indicating that his employment was at risk and his employer would re-employ him if released from detention. According to her, the WhatsApp messages placed before the court indicate an attempt to emotionally manipulate the complainant. This conduct constitutes a direct attempt to influence the State witnesses.

[25] The Respondent's counsel further referred to the Appellant's past conduct and the fact that the charge in count one has an element of violence. She submitted that he failed to show exceptional circumstances which justify his release from detention as provided for by the Act. She also stressed that the Appellant does not play an active role in the life of his minor child. She further contended that the Appellant's parents are both employed and there was no evidence to confirm that the Appellant's prolonged detention would lead to them losing their accommodation. Moreover, the Appellant possesses a passport and has no substantial assets anchoring him in Mitchells Plain. According to her, the State has a strong prima facie case which is supported by the medical evidence and the complainant's statement. The Appellant faces life imprisonment, should he be convicted of counts one and two, and that could be an incentive for him to evade his trial. She, however, conceded that in respect of count one, the State will have difficulties to prove the elements of the offence because of the contractions which became evident during NG's testimony. In the end, she was of the view that the court a quo did not err in finding that no exceptional circumstances exist, which warrant the appellant's release from detention.

Applicable legal principles and discussion

[26] Section 65(4) of the Act provides that 'a court hearing an appeal shall not set aside the decision against which an appeal is brought unless such court is satisfied that the decision is wrong, in which event the court shall give the decision which in its opinion the lower court should be given'. The court cannot interfere with the magistrate's decision unless the magistrate misdirected himself or herself in some material way when considering the bail application.¹ If such misdirection is established, the appeal court is at large to consider whether bail ought to have been

¹ *S v Ali* 2011 (1) SACR 34 (ECP) para 14.

granted or refused in the particular circumstances of the case. In the absence of a finding that the magistrate misdirected himself or herself, the appeal must fail.

[27] The Appellant raised several grounds which according to him shows that the magistrate misdirected herself in finding that he did not adduce evidence which in the interests of justice warrant his release from detention.

Did the Appellant show exceptional circumstances as envisaged in section 60(11)(a) of the Act?

[28] The law governing bail applications is section 60 of the Act. Section 60(11)(a) of the Act provides as follows:

‘Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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.’

[29] Section 60(11)(a) of the Act is peremptory, and it requires a bail applicant to adduce evidence which satisfies the court that exceptional circumstances exist which warrant his release from detention. Exceptional circumstances are not defined by the Act, however. In *S v Vanqa 2000 (2) SACR 371 (TK)*, the court held that it was wrong to attach the ordinary grammatical meaning to the phrase “exceptional circumstances”. In coming to this conclusion, the court approved the dictum in *S v Yanta 2000 (2) SACR 237 (TK)* at 243H – 244 A, where the court held that:

‘The approach adopted by Kriegler in *Dlamini* suggests that exceptional circumstances as envisaged by section 60 (11) (a) are not to be construed as requiring an accused to place before a court factors or circumstances in addition to those provided in subsections (4), (9) and (10) of the act. The enquiry remains the same, namely a weighing of considerations referred to in subsections (4) (9) and (10) of section 60 and then to exercise a value judgment according to all the relevant criteria on the facts placed before a court. At the end of the day the court has to

decide if those factors which have been found to exist and which favor the release of an accused from detention are such, weighed against the interests of justice, so to constitute exceptional circumstances for the purposes of subsection 11 (a).....’

[30] It is important to note, at the outset, that the court a quo defined the words “exceptional circumstances as something unusual, out of the norm and out of the ordinary”. In addition, the court referred to the guidance the courts get from case law that exceptional could be a number of things even the ordinary personal circumstances presented in a specific way could be deemed exceptional. The approach the court adopted sets the bar high and ignores the accused’s right not to be detained arbitrarily and to be released on bail. Section 35(1)(f) of the Constitution guarantees an accused person the right to be released from detention if the interests of justice permit. In my view, attaching the ordinary meaning to the words will make it difficult for those arrested of committing offences to be released from detention even if the interests of justice warrant their release. Section 60(4), (9) and (10) provide a better guidance and promote an accused person’s right to a fair hearing, as they mandate courts to balance the interests of justice against the accused person’s right to his or her personal freedom.

[31] In its judgment, the court slammed the Appellant for failing to explain what is exceptional about living with his mother and his stepfather and having a child. It failed to consider other relevant factors which must be considered in applications of this nature. It found support from the decision of the *State v Scott-Crossley* but did not provide a full citation thereof. In its judgment, the court a quo held that “the court in Scott Crossley found that ordinary circumstances can never be exceptional.”

[32] In *Scott-Crossley*, the court dealt with an appeal against the court’s refusal to release the Appellant on bail pending appeal. The Appellant was already convicted and sentenced for a Schedule 6 offence. The court had to consider exceptional circumstances in the context of a person who has been convicted. In other words, the court had to balance whether the prospects of success against a conviction amounted to exceptional circumstances that in the interests of justice permitted the Appellant’s release on bail pending the outcome of the appeal. In the end, the court held that “the prospects of success do not in itself amount to exceptional

circumstances as envisaged by the Act. The court must consider all the relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release. The court held further that even though the Appellant was granted leave to appeal, he had no prospect of avoiding a custodial sentence and as far as the Appellant's personal circumstances were concerned, they were commonplace and not out of the ordinary - none of the factors constituted exceptional circumstances.²

[33] The only similarity I could find between the two cases [Scott Crossley and this matter] is that the Supreme Court of Appeal in *Scott-Crossley* had to decide on the existence of exceptional circumstances as well. The court did not define the words 'exceptional circumstances' but was referring to the Appellant's personal circumstances in that matter. It is trite that each case must be decided on its own merits, and it should be accepted that what is exceptional in one case may not be exceptional in another. The court in this matter ought to have considered all the relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances.

The interests of justice

[34] Section 60(4)(a) to (e) provides that the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (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;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;
- (c) 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 and or destroy evidence;
- (d) where there is the likelihood that the accused, if he were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

² *S v Scott- Crossley* 2007 (2) SACR 470 (SCA).

- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[35] When considering the likelihood of evading trial one of the factors the court must consider among others is the community or occupational ties of the accused to a place. This is one of the important factors to consider because it touches on the purpose of bail which is to secure the attendance of the accused at trial. I accept that the Appellant is a holder of a passport, however, he stated in evidence that should he be ordered to surrender it to the investigating officer, he will abide by that condition. Moreover, his income was disclosed in evidence, and it became clear that he would not be able to afford to travel abroad even if he wanted to. He is a first-time offender and has no pending cases or outstanding warrants against him. To my mind, these are the factors the magistrate ought to have taken into account among others before determining if the Appellant succeeded to adduce evidence which satisfies the court that exceptional circumstances exist, which in the interests of justice warrant the release of the Appellant from detention.

[36] From the bail proceedings, it became apparent that a medical report was perused by the magistrate and the medical doctor observed that all gynaecological parts of CG's body were intact except for the posterior rim, marginal edge of the hymen, and configuration. The medical doctor then concluded that "the lack of clinical evidence does not exclude a sexual offence due to the lapse of time".

[37] During the discussion with the parties, the magistrate said the hymen is not intact and is something else. All this was said because there was a word in the report that was illegible and the court could not make sense out of it. Despite this, the magistrate was of the view that she must consider that it is a nine-year-old child who very eloquently described exactly what happened to her. The magistrate also stated that CG told the medical practitioner that her mother's ex-boyfriend raped her on multiple occasions by putting his fingers into her vagina and his penis in her anus. In her judgment, the magistrate found that the lack of clinical findings does not mean that there were no injuries and based on this she was of the view that the State has a strong prima facie case against the Appellant.

[38] It is so that bail proceedings are *sui generis* and inquisitorial in nature. However, the manner in which the court a quo dealt with the medical evidence was unreasonable and impacted negatively to the prejudice of the Appellant. It is clear from the record that the doctor could not make any clinical findings but stated that “the lack of clinical evidence does not exclude sexual offence due to the lapse of time”. However, in the end, the magistrate made unreasonable inferences and concluded that the medical doctor did not indicate that the hymen was not intact despite the inability to attach a meaning to the illegible word on the medical report.

[39] The opinions of expert witnesses involve the drawing of inferences from available facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any findings of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. The Supreme Court of Appeal referred with approval to what Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Colliers Ltd* “that inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which are sought to establish. But if there are no positive proven facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture”.³

[40] To my mind, it was inconceivable for the magistrate to conclude that the State has a strong case against the accused if her basis was on the medical report, especially if one considers that the contents of the medical report could not be fully understood. These were not trial proceedings, but bail proceedings. All that the court needed to determine was whether the State has a strong *prima facie* case against the Appellant. Second-guessing the views or findings of the medical doctor was not justified.

[41] Pursuant to the amendments introduced by section 60(4)(d) of the Criminal and Related Matters Amendment Act 12 of 2021, section 60(5) reads as follows: in

³ *AM and Another v MEC for Health, Free State* 2021 (3) SA 337 (SCA) para 21.

considering whether the grounds in subsection (4)(a) have been established, the court may, where applicable take into account the following factors:

- (a) the degree of violence towards others implicit in the charge against the accused?
- (b) Any threats of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person,
- (c) Any resentment the accused is alleged to have to harbour against a person against whom the offence in question was allegedly committed or any other person,
- (d) Any disposition to violence on the part of the accused, as evident from his past conduct,
- (e) Any disposition of the accused to commit-
 - (i) Offences referred to in schedule 1,
 - (ii) An offence against any person in a domestic relationship as defined in section 1 of the domestic Violence Act, 1998,
 - (iii) An offence referred to in –
 - (aa) section 17(1)(a) of the Domestic Violence Act, 1998;
 - (bb) section 18 (1)(a) of the Protection from Harassment Act, 2011; or
 - (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused.

[42] It will be noted that the Appellant does not have any previous convictions and even though he is alleged to have committed offences in respect of people he was in a domestic relationship with, there are no allegations that he threatened them at any stage after he allegedly committed these offences. The offences are prevalent but there was no evidence led showing any disposition on the part of the Appellant to commit a Schedule 1 offence.

[43] NG testified during the State's endeavours to oppose bail. Obviously, the State intended to comply with the provisions of section 60(2A) of the Act which provides as follows:

'The court must before reaching a decision on the bail application, take into account

- (a) Any pre-trial services report regarding the desirability of releasing an accused on bail, if such report is available and

(b) The views of any person against whom the offence in question was allegedly committed, regarding his or her safety.'

[44] This piece of legislation promotes a victim centred approach and mandates the court to take into consideration the complainant's safety before considering whether to release the accused on bail. This section should be construed as confining the court to consider only the two aspects as envisaged by the Act. It is noteworthy that a bail court is not a trial court and should not concern itself with the guilt of the Appellant or the credibility of the witnesses. It is only required to determine whether the Appellant satisfied the court that exceptional circumstances exist which in the interests of justice permit his release on bail. Extending the intention of section 60(2A) of the Act will jeopardise the States case before the matter is referred to trial because the complainant does not enjoy the rights envisaged in section 35 of the Constitution in particular the right to remain silent.

[45] In addition to her views regarding her safety, NG testified on the merits of the case. As a result, she was subjected to cross examination as if she was testifying in the trial proceedings. These are the dangers that should be avoided when applying the provisions of section 60(2A) of the Act. Moreover, it can be noted from the court's judgment that the court a quo did not ignore what came out during cross examination. In her judgment, the magistrate questioned the Appellant's version and stated that the appellant never mentioned that it was the complainant who assaulted him with a phone, and that calls to question why not. This is indicative of the court's a quo's failure to take into account the Appellant's right to remain silent and the fact that the question she was there to answer was not the guilt of the appellant but whether the interests of justice justify his release from detention.

[46] Section 60(9) of the Act provides that in considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors:

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to delay;
- (d) any financial loss which the accused may suffer owing to his detention;
- (e) any impediment to the preparation of the accused defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused;
- (g) any other factor which in the opinion of the court should be taken into account.'

[47] The legislature having included subsection 9 in section 60 of the Act imposed a mandatory duty to the court to ensure that the accused's right to a fair hearing in bail applications is enhanced. The provisions of this subsection require the courts to ensure that the interests of justice in bail applications are weighed against the accused's right to be released from detention before determining whether to grant or refuse bail. Failure to comply with the provisions of this subsection may cause the principle of the interest of justice meaningless and ineffective.

[48] The magistrate applied the provisions of this subsection and conducted the balancing exercise as provided for by the Act. However, she made a conclusion that there is a likelihood that the accused will intimidate the State witnesses should he be released from detention. She based this finding on the fact that the Appellant exchanged WhatsApp messages with his NG, the complainant in count three. In this regard, the court failed to consider that the conversation between the Appellant and NG was after their breakup. At the time, there were no allegations made against the Appellant and attaching bail conditions in this regard could be sufficient to ensure that the Appellant is prohibited from communicating with the complainants until the trial is finalised. Moreover, there is no evidence that the Appellant had violated the protection orders, as there were no orders granted against him at the time. The two protection orders referred to in evidence were interim orders which were granted after the allegations were made and the bail application was heard in April 2025 before the return date [the 6 May 2025].

[49] I also agree with the sentiments of the Appellant's counsel that the court did not have any basis to conclude that the Appellant had suicidal thoughts. This is what was said by the Appellant during their WhatsApp conversation shortly after their breakup. Since then, there were no allegations made that he tried to kill himself. In the end, I am of the view that the Appellant succeeded to prove on a balance of probabilities that there are exceptional circumstances which in the interests of justice warrant release his release on bail.

Factual findings

[50] In my mind, the Appellant's personal circumstances and the weaknesses in the State's case in respect of all the charges cumulatively amount to exceptional circumstances which in the interests of justice warrant the release of the Appellant on bail as provided for by the Act. The record shows that the magistrate did not adequately consider all the relevant factors in her decision to deny bail in the circumstances. The court concludes that the lower court's decision to deny bail was wrong.

Order

[51] In the end, the court makes the following order:

- (a) The Appellant's appeal against the refusal of bail is upheld.
- (b) The order of the court a quo is set aside and substituted with the following order:
 - (i) Bail is granted at R5000 (five thousand rands) subject to the following conditions:
 - (aa). The Appellant is ordered to reside at [...] P[...] Street, Mitchells Plain until the trial in the matter is finalised.
 - (bb). The Appellant is ordered to inform the investigating officer of any change of his residential address, in writing, before vacating from number [...] P[...] Street, Mitchells Plain.

- (cc). The Appellant is ordered to report to the nearest police station every Mondays, Wednesdays, and Saturdays, between 08:00 AM and 20:00 PM.
- (dd). The Appellant is ordered to refrain from communicating with both witnesses in this matter either in person or any other form of communication until the trial in this matter has been finalised.
- (ee). The Appellant is prohibited from entering the Delft area for any reason whatsoever, until the trial in this matter has been finalised.
- (ff). The Appellant shall not leave the Western Cape Province without the written consent of the investigating officer.
- (gg). The Appellant shall surrender his passport to the investigating officer who shall keep it in his possession until the matter is finalised.
- (hh). The Appellant is ordered to abide by the conditions of the protection orders that were granted in favour of the two complainants.
- (ii). The Appellant shall attend court on all the dates for trial, as required, until the trial in this matter is finalised.

N. GXASHE

ACTING JUDGE OF THE HIGH COURT

Appearances

For Appellant: Adv. G Jose

For Respondent: Adv. M September-Qatana