

**In the High Court of South Africa
(Western Cape Division, Cape Town)**

REPORTABLE

Bail appeal case number: A218/2021

Magistrate's Court case number: Wynberg F458/2021

In the matter between:

MAGMOED SAKILDIE

Appellant

and

THE STATE

Respondent

JUDGMENT

Delivered on 15 February 2022

VAN ZYL AJ

Introduction

1. This matter came to this Court by way of an appeal against the refusal of bail to the appellant by the Wynberg Magistrate's Court on 11 August 2011. The appellant, Mr Magmoed Sakildien, is charged with the rape of a 69-year old disabled woman. The crime was allegedly committed on 5 July 2021, in Wynberg.

2. Aggrieved by this result, the appellant appealed against the refusal in terms of section 65(1) of the Criminal Procedure Act, 1977 ("the CPA"). The appellant's grounds of appeal are, essentially, as follows:

a. The lower court erred in finding that the appellant had failed to prove

exceptional circumstances, which justified the granting of bail.

b. The lower court failed to attached any weight, or attached insufficient weight, tot the facts that:

- i.The appellant has no previous convictions, pending cases or outstanding warrants;
- ii.The appellant was a young man of 22 years of at the time of the alleged commission of the offence;
- iii.The relationship between the victim and the appellant is that of grandmother and grandson; and
- iv.The appellant lived with his parents in a normal family setup.
- v.These factors indicate that the appellant is a normal 22-year old who is stable and rooted in the community.

c. As regards the crime itself, the lower court failed adequately to consider the following factors:

- i.The crime had elements of a crime of passion;
- ii.The family setup does not exclude the defence of consent;
- iii.The version of the State depends solely on a video, the admissibility of which might be in issue.

d. The lower court over-emphasized the seriousness of the crime, and failed to sufficiently consider other issues such as that:

- i.The appellant is not a danger to society;
- ii.The appellant will not abscond;
- iii.The repetition of the offence is unlikely;
- iv.The appellant will not meddle with the witnesses; and
- v.The appellant has co-operated with the police.

3. The State opposes the appeal upon considerations that will be dealt with in the course of the discussion below.

When may the magistrate's decision be overturned?

4. In terms of section 65(2) of the CPA, read with section 63(3), the Court is bound by the record, and there is no scope for placing additional facts before the Court for the purposes of the hearing on appeal (*S v Ho* 1979 (3) SA 734 (W) at 737G).

5. Section 65(4) of the CPA provides that 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.*”

6. A court may interfere on appeal when the lower court misdirected itself materially in respect of the relevant legal principles or the facts of the case (*S v Essop* 2018 (1) SACR 99 (GP) at paras [34]-[35]), or where the lower court overlooked important aspects in coming to its decision to refuse bail (*Ramasia v S* (A24/2012) [2012] ZAFSHC 88 (3 May 2012)). The power of the court on appeal are thus similar to those in an appeal against conviction and sentence (*S v Ho* 1979 (3) SA 734 (W) at 737H).

7. Nevertheless, in *S v Porthern and others* 2004 (2) SA SACR 242 (C) the Court observed at para [17] that it remains necessary “*to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court’s competence to decide that the lower court’s discretion to refuse bail was ‘wrong’.*”

8. The mere fact that the reasons for refusing bail are brief, is not in itself a sufficient ground for the court of appeal to infer that insufficient consideration was given to the considerations set out in section 60 of the CPA (*S v Ali* 2011 (1) SACR 34 (ECP) at para [15]).

9. In the present matter, the appellant effectively contends that the lower court misdirected itself by overemphasizing the seriousness of the charge at the expense

of the appellant, thereby disregarding his personal circumstances and the failing to consider the factors in section 60(4) as being exceptional in the context of the case.

10. It is against this background that I consider the facts at my disposal, and the argument presented by the parties.

Has the appellant shown the existence of exceptional circumstances warranting the grant of bail?

11. The starting point in bail applications generally is section 60(1)(a), which provides that *“an accused who is in custody in respect of an offence shall ... be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.”*

12. Section 60(4) enjoins the Court, in determining a bail application, to have regard to the following factors in deciding whether to grant bail:

“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; or

(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; or

(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 or destroy evidence; or

(d) 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; or

(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.”

13. Section 60(11) of the CPA constitutes an exception to the general entitlement to be released on bail as set out in section 60(1), read with section 60(4):

“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;

(b) 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.”

14. Rape is a Schedule 6 offence. In the premises, the appellant must show, by adducing evidence, that exceptional circumstances exist which, in the interests of justice, permits his release on bail. In *S v Petersen* 2008 (2) SACR 355 (C) at para [54] it was stated that *“...it is clear that the onus is on the accused to adduce evidence, and hence to prove, the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice”*.

15. In paragraphs [55] and [56] of the same case the concept of “exceptional circumstances” was explained as follows:

“Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, different degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice

to order the release of the accused person. ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

16. I agree with the appellant's counsel that a charge in respect of a Schedule 6 offence is not an absolute bar to the granting of bail, and that bail is not punitive in character. That much is clear from a proper interpretation of the relevant provisions of the CPA. There are, however, various factors that militate against the grant of bail in the present matter.

17. Firstly, the appellant had legal representation at the time of the bail hearing, but did not challenge the State's case in his bail application. The appellant has admitted that he had sexual intercourse with his grandmother. The State argued that, given that the video was taken by civilians in a family setup, there is little chance of it being held to be inadmissible for the purposes of trial. The video evidence is, moreover, not the only evidence that will be presented against the appellant at the trial in due course.

18. Secondly, the appellant did not provide any evidence in support for his conclusion, in his affidavit delivered in support of his bail application, that it would be "in the interests of justice" that he be released on bail. He set out his details in a generic matter on the application form, and did not give oral evidence in elaboration. He has, in short, not placed any evidence on record which can be relied upon to prove the existence of exceptional circumstances.

19. Thirdly, the complainant and the witnesses are all known to the appellant, as they are family. They have indicated that they will testify against the appellant in due course. There are not strangers to him, and he would know their weaknesses. As such, it would not be unreasonable to fear that he would attempt to influence them. I do not agree with the appellant's argument that the mere fact that they were the ones who brought him to justice will cause them to resist any attempt at influence, and that there is therefore no such risk. The fact that the appellant will, if released on bail, go to reside with his other grandmother in Maitland does nothing to allay the fears in this respect.

20. Fourthly, I do not agree with the appellant's counsel that the fact that the crime was committed in a family setup constitutes an exceptional circumstance in his favour. I do not agree that the offence with which the appellant is charged can be described as a "crime of passion", committed by a young man who simply acted on his urges, who should be regarded as a "normal" 22-year old, and who is unlikely to repeat the crime. I also do not agree with the submission that the possibility that the grant of consent by the victim is not excluded by the available video evidence should be regarded as an exceptional circumstance. The appellant chose one of the most vulnerable persons as his target. She was available to him, living in the same household. She was elderly and, on the evidence of the investigating officer, blind, bed-ridden, suffering from dementia, and unable to care for herself. She was unable to fight back. She was a convenient victim, targeted repeatedly. There is no assurance that the appellant will not seek victims further afield, now that he is under scrutiny as far as his grandmother is concerned.

21. Fifthly, as alluded to above, the event captured on video was seemingly not the first occasion on which the appellant had intercourse with the victim. The evidence of the investigating officer is that the victim's behaviour observed one evening – by sitting up straight in her bed – made one of the witnesses suspicious. From this behaviour it seems probable that the victim had had previous encounters with the appellant. According to the evidence available, the appellant cleaned the victim after having had intercourse with her. All of this indicates a degree of premeditation on the appellant's part.

22. In the sixth place, the appellant's counsel argued that it should be taken into account, as an exceptional circumstance, that the rape was not accompanied by torture or extreme violence as is often encountered in rape cases. I do not agree that a "gentle" rape constitutes an exceptional circumstance. The medical evidence following an examination of the victim is compatible with the allegations of sexual assault or vaginal penetration. The appellant's counsel conceded, in argument, that rape is always "aggravating", but submitted that the familial bond between the appellant and the victim places the event in the category of "exceptional" for the purposes of the appeal. I do not agree that such familial bond constitutes an

exceptional circumstance as contemplated by section 60(11)(a).

23. In the seventh place, the personal circumstances advanced by the appellant do not constitute exceptional circumstances as contemplated by section 60(11). In *S v Botha* [2002] 2 All SA 577 (A) the accused advanced similar circumstances, which the Appellate Division (at para [17]) did not regard as exceptional in the face of a *prima facie* case.

24. The appellant argues that his personal circumstances, viewed in totality, should be regarded as exceptional given the context in which crime was allegedly committed, and the fact that it occurred within a family setup. I fail to see how the circumstances set forth can be regarded as exceptional in favour of the appellant. On the contrary, it appears to me that they point towards the correctness of the lower court's decision.

25. The appellant argues further that his personal circumstances indicate that he is stable and rooted in the community. The fact that the appellant is unemployed and unmarried, however, makes it easy for him to abscond, whatever the degree of his co-operation with the police up to this stage. He had to co-operate initially, as he was caught out. That does not mean that he will not attempt to evade a trial in due course.

26. On a consideration of the matter as a whole, I am not satisfied that the magistrate's court misdirected itself materially on the legal principles involved, or on the facts. The evidence on record, viewed as a whole, shows that the appellant failed, at the bail hearing, to discharge the onus of proving that exceptional circumstances exist that justify his release in bail in the interests of justice. He simply did not adduce evidence that could persuade a court that it would be in the interests of justice to release him on bail.

27. A final consideration (although not an overarching one) is the view that the community would take of an offence such as the one with which the appellant is charged. Counsel for the State referred the Court to *Carmichele v Minister of Safety and Security and another* 2002 (1) SA 79 (CC), where the following is stated at para

[62]:

“... In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the amicus curiae:

“Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.”

She referred in that context to the following statement by the SCA in the Chapman case:

“The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.”

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.”

Order

28. In the circumstances, it is ordered as follows:

The appeal is dismissed.

P S VAN ZYL AJ

HEARING DATE: 15 February 2022

W. A. Fisher for the appellant (instructed by Isaacs Attorneys)

L. Snyman for the respondent (Director of Public Prosecutions, Western Cape)