

SOUTH AFRICA / JUDGMENT

A.O v S (Bail Appeal) (A104/2025)

[2025] ZAWCHC 274 (30 June 2025)

[2025] ZAWCHC 274**COURT**

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

A104/2025

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal case number: A104/2025

Lower court case number: 16/740/2024

In the matter between:

A[...] O[...] Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 30 JUNE 2025

VAN ZYL AJ:

Introduction

1. This is an appeal against the refusal of bail.
2. The appellant was arrested on 30 November 2024 and appeared in Cape Town Magistrates' Court on 2 December 2024. He faced three charges, namely:

2.1. Count 1: Contravening section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (sexual assault of a minor);

2.2. Count 2: Contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape of a minor); and

2.3. Count 3: Assault with the intent to do grievous bodily harm.

3. His 14-year old daughter was the complainant. The appellant had legal representation, and it is common cause that the bail application fell within the purview of Schedule 6 to the Criminal Procedure Act 51 of 1977 ("CPA"). The appellant faces life imprisonment in respect of the rape charge.

4. At the hearing on 2 December 2024 the matter was postponed to 13 December 2025, to allow the State to verify the appellant's "status" at the Department of Home Affairs, to obtain an alternative address for him, and to obtain the view of the complainant as regards the appellant's possible release.

5. On 13 December 2024 the State confirmed to the magistrates' court that it had obtained a "withdrawal" statement from the complainant. It appears from the record that the complainant had withdrawn her complaint by way of an affidavit deposed to at the Milnerton Police Station on 9 December

2024. The affidavit was in the docket. There was nothing (in particular, no statement in terms of section 212 of the CPA) from the Department of Home Affairs on the status of the appellant. The matter

was postponed for a decision to be made by the Senior Public Prosecutor in relation to the further conduct of the matter.

6. On 20 December 2024 the State indicated it would not withdraw the charges, and the matter was postponed for a bail application. The bail application commenced on 17 January 2025, with the appellant giving oral evidence. After the conclusion of his evidence the matter was postponed to 21 February 2025.

7. On 23 January 2025 the complainant provided a handwritten note in which she again withdrew her complaint, and apologized for her conduct.

8. The bail application proceeded in 21 February 2025, and the appellant gave further viva voce evidence. He was also cross-examined by the prosecutor, and thereafter questioned by both the court and again by his legal representative.

9. Following a postponement to 4 March 2025, the application proceeded.

The defence submitted a bundle of documents which was accepted into the record. The bundle comprised various documents totalling sixty pages, with an index. On the same day the State commenced leading evidence by reading the affidavit of the investigating

officer into the record. I may add that the investigating officer's affidavit opposing bail in this matter was singularly unhelpful in the consideration of the relevant issues. It contained the bare minimum of facts, and essentially consisted of a series of conclusions mirroring the content of section 60(4) of the CPA.

10. The State submitted documents which were received as exhibits, including the appellant's criminal profile; the J88 medical report in respect of the complainant; the Form 7 medical report and assessment relating to the complainant;[1] the Form 22 (the reporting of possible abuse) relating to the complainant;[2] and the

MCS enquiry form from the Department of Home Affairs relating to the complainant. There was no such form in relation to the appellant. On a consideration of the evidence on record, the appellant's evidence could not seriously be disputed.

11. On 17 March 2025 the magistrates' court heard argument and delivered judgment, refusing the application. The court concluded:

"... a disposition to violence in the past conduct of the applicant as is evidence from his past conduct... you were arrested for assault.

... The court finds it quite strange. Number 1, it is proof that you do have a company registered however, that being done without being legal in South Africa ...

... Your past shows you were arrested for intimidation and so, because of that there is a greater possibility that (you might influence witnesses) ...

... The court cannot find any exceptional circumstances..."

12. The appellant delivered a notice of appeal against the magistrates' court's refusal of bail on 20 May 2025.
13. I proceed to set out the relevant legal principles, and to discuss the facts of the present matter thereafter.

The proper approach in bail appeals such as the present

14. In relation to Schedule 6 offences, section 60(11) of the CPA provides that:

"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."

15. In *S v Schietekat*[3] the Court held that bail proceedings are "... sui generis. The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality.

The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value

judgment

of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that 'exceptional circumstances exist which in the interests of justice permit his release'." [4]

16. What are exceptional circumstances? In *S v Petersen* [5] it was held as follows: "Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.

There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference." [6]

17. In *S v Josephs* [7] it was held: "Showing 'exceptional circumstances' for the purposes of section 60(11) of the Criminal Procedure Act does not post a standard which would render it impossible for an unexceptional, but deserving Applicant to make out a case for bail." Personal circumstances that are commonplace do not constitute exceptional circumstances for the purposes of section 60(11)(a). [8]

18. Finally, in *S v Acheson* [9] it was held that "[a]n accused person cannot be kept in detention pending his trial as a form of anticipatory punishment."

19. This sentiment was echoed in *S v Branco*: [10]

"It must however be borne in mind that any court seized with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the Constitution. Such freedom should only be lawfully curtailed if 'the interests of justice so require'. (See s 35(1) of the Constitution, which entitles any arrested or detained person 'to be released from detention if the interests of justice permit; subject to reasonable conditions'.) The fundamental objective of the institution of bail in a democratic society based on freedom is to maximise personal liberty."

20. Section 65(4) of the CPA provides in relation to bail appeals that "[t]he 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." [11]
21. In *S v Porthen and others*, [12] this Court decided, with reference to *S v Botha*, [13] that the appeal court's powers to consider an appeal against the refusal of bail in terms of section 65(4) of the CPA are not constrained. The appeal court is at liberty to consider its own analysis of the evidence in order to conclude whether an accused

person has discharged the onus on him as set out in section 60(11)(a) of the CPA:

“Insofar as the quoted dictum in S v Barber ... might be amenable to be construed to suggest that the appellate Court's power to intervene in terms of s 65(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s 60(11)(a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case supra....

It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA. ...Without in any way detracting from the courts' duty to respect and give effect to the clear legislative policy inherent in the provisions of s 60(11)(a) of the CPA (viz that save in exceptional circumstances it is in the public interest that persons

charged with the class of particularly serious offences listed in Schedule 6 to the CPA should forfeit their personal freedom pending

the determination of their guilt or innocence ...), it is still necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 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 decision to refuse bail was 'wrong'.”[14]

22. Thus, even if the Court finds that the magistrate was wrong, the Court must then consider the facts before it afresh and determine whether the appellant has discharged the onus as set out in section 60(11)(a) of the CPA.

The grounds of appeal in the present matter

23. I agree with counsel for the appellant that there are three core grounds of appeal upon which this matter can be determined, and which justify interference with the magistrates' court's decision.
24. The first is that the magistrates' court failed to appreciate the impact of the complainant's deposing to an affidavit under oath to the effect that she had lied in her initial complaint, and retracted her allegations. This constitutes an exceptional circumstance.
25. Secondly, the magistrates' court misdirected itself in concluding that the appellant was "illegally" in the country, despite the absence of evidence to sustain this. The appellant, in fact, furnished evidence to the effect that he had applied for renewed permission to remain in the country (his visa having expired), but that he had not yet had a response from the Department of Home Affairs.

26. The magistrates' court erroneously found, thirdly, that the appellant's previous arrests, which had been found not to warrant the criteria required for a prosecution, and had been withdrawn, indicated that the appellant had a propensity to intimidate people.
27. The appellant hails from Nigeria. He has formally applied for a renewal of his temporary residence visa, and is awaiting the outcome.
28. It is common cause that the appellant has a clean criminal record, with no previous convictions or warrants of arrest outstanding. He has a fixed address,[15] and is self-employed with his own business. The appellant is the sole-breadwinner for his three minor children, and his company

employs multiple people. The appellant had previously been arrested, but he explained in his oral evidence that the charges were withdrawn at the police station, and were no longer pending.

29. A consideration of the magistrates' court's judgment indicates that the magistrate made no finding as to the likelihood of the appellant concealing or destroying evidence if released on bail, or any finding to the effect that his release on bail would disturb the public order or undermine the public peace or security. There is in any event no evidence on record that would have justified any such findings against the appellant.
30. The magistrate did find, with reference to section 60(4)(a) of the CPA, that there is a likelihood that the appellant would endanger the "safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person, or would commit a Schedule 1 offence". The magistrate found that this factor existed for two reasons, namely the nature of the charges, and the appellant's previous arrests. The magistrate was of the view that section 60(4)(c) of the CPA in relation to the likely intimidation or influence of witnesses applied for the same reasons, in particular the appellant's previous arrests.
31. I am respectfully in disagreement with the magistrates' court's findings on this score. There is no denying that the nature of the charges does include elements of violence, but that does not automatically attract the application of this section. Such logic would mean that the section would be applicable to every charge where violence is an element and thus that no-one could be granted bail after such an arrest. The focus of the enquiry is, rather, on the nature of the allegations, and the appellant's version in relation to whether it means the appellant will, in the future, endanger anyone.
32. The existence of previous arrests in the present matter cannot count against the appellant. The fact that the NPA is not proceeding with these charges (and has not indicated any intention to do so in the future), indicates that they are effectively nothing more than previous allegations of insufficient merit to attract a prosecution. The appellant was clear in his explanation, in the course of oral evidence, of how the charges had arisen, and that they had been fueled by a misunderstanding.

33. As to the possible intimidation of the complainant, it is common cause that she is in the protection of the State at a place of safety. The appellant does not know where this is.
34. The magistrate found that the factor referred to in section 60(4)(b) of the CPA is present, namely that there is a likelihood that the appellant would attempt to evade his trial, should he be released on bail. This was so principally by reason of the appellant's being in the country "illegally".
35. I agree with the submission by the appellant's counsel that the magistrate committed a material error in labelling the appellant as illegal, and refusing bail on that ground. The State is not pursuing charges in terms of section 49 of the Immigration Act 13 of 2002 against the appellant. No evidence has been produced to prove that the appellant is undocumented. There is no section 212 statement from the Department of Home Affairs in relation to the appellant on record, despite a postponement having being sought to obtain it. The appellant, on the other hand, has shown the existence of a registered company, a bank account at First National Bank, and a VFS receipt for a temporary residence visa application. It cannot be concluded that he is illegally in the country.
36. As to exceptional circumstances, it is common cause that the complainant has recanted her complaint as a lie. There is speculation on record to the effect that the complainant's step-mother influenced her in this regard, but there is no evidence at all to support this conjecture. The trial court will have to make a credibility finding in this respect in due course. Whilst it appears that the prosecutor had a consultation with the complainant, there has been no further investigation into what exactly had given rise to the retraction.
37. I agree that the complainant's retraction constitutes an exceptional circumstance in the present matter, notwithstanding the fact that the charges are undoubtedly serious. The reality is that the denial of bail will result in the appellant spending a considerable period of time in custody awaiting trial on an allegation that has prima facie been recanted. No trial date has yet been allocated.

Conclusion and order

38. I am thus of the view that the appellant has discharged the onus placed upon him by section 60(11) of the CPA. It follows that the magistrates' court's refusal to grant bail should be set aside.
39. In *S v Branco*[16] the court held that a "court should always consider suitable conditions as an alternative to the denial of bail. Conversely, when no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion. The appellant has stated on oath that he is prepared to report to the police station. This was not challenged."
40. I consider that the conditions set out in the order below will serve to ensure that the appellant stands trial in due course.

41. It is accordingly ordered as follows:

1. The appeal is upheld and the magistrate's refusal on 17 March 2025 to grant bail is set aside.
2. The appellant is granted bail in the amount of R10 000,00 [ten thousand rand].
3. If that amount is paid to the Clerk of the Court, the appellant shall be released on bail, and warned to appear at the Cape Town Magistrates' Court on 9 July 2025 and all further dates upon which the matter is to be dealt with.
4. Bail is granted subject to the following conditions:
 - (a) The appellant must surrender his passport and any other travel documents in his possession to the investigating officer within 24 hours of being released on bail.
 - (b) The appellant may not apply for any passport or other travel documents.
 - (c) The appellant shall reside at Unit 2[...], E[...]-o[...]-B[...], 1[...] B[...] Street, Cape Town.
 - (d) The appellant may not change his address without the prior written permission of the investigating officer.
 - (e) The appellant is to report to the Table View Police Station every Monday, Wednesday, and Friday between the hours of 06:00 and 18:00.
 - (f) The appellant may not depart from the metropolitan area of the City of Cape Town without informing the investigating officer in writing.
 - (g) The appellant may not directly or indirectly have contact or communicate with the complainant or any other State witnesses or potential State witnesses whose names appear in the docket or whose names are communicated to the appellant by the State.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the appellant: Mr R. McKernan, instructed by Lundi Maki Attorneys

For the respondent: Mr M. Koti, Directorate of Public Prosecutions, Western Cape

[1] Under the Children's Act 38 of 2005.

[2] Ditto.

[3] 1998

(2) SACR 707 (C) at 713 H-J.

[4] Emphasis added.

[5] 2008

(2) SACR 355 (C) para 55.

[6] See also S v H 1999

(1) SACR 72 (W) at 77E-F: "... Exceptional circumstances must be circumstances which are not found in an ordinary bail application but pertain peculiarly ... to an accused person's specific application. What a Court is called upon to do so is to examine all the relevant considerations ... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60(11) (a)."

[7] 2001

(1) SACR at 659 (C) at 668I. The evidence against the applicant was purely circumstantial, and this was a factor which was taken in consideration by the Court in granting the applicant bail.

[8] S v Scott-Crossley 2007

(2) SACR 470 (SCA) para 12.

[9] 1991

(2) SA 805 (NmHC) at 822 A-B.

[10] 2002

(1) SACR 531 (W) at 532i - 533a.

[11] See Mafe v S [2022] ZAWCHC 108 (31 May 2022) para 95.

[12] 2004

(2) SACR 242 (C) paras 16-17.

[13] 2002

(1) SACR 222 (SCA).

[14] Emphasis added.

[15] Although the appellant's family was evicted (due to the non-payment of rental following the appellant's arrest and detention) from the house in which they had lived at the time of the bail application, they have been provided with new accommodation.

The State is in possession of the relevant information.

[16] 2002

(1) SACR 531 (W) at 537A-B.

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