

SOUTH AFRICA / JUDGMENT

Kalbo v S (A24/2025) [2025]

ZAGPJHC 536 (28 May 2025)

[2025] ZAGPJHC 536

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

A24/2025

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: A24/2025

1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED: YES

28 May 2025

In

the matter between:

GISACHO

ANITO KALBO

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail by the Randburg Regional Court on 16 August 2024, as well as a bail application on new facts which was dismissed on 15 January 2025.
- [2] The appellant is charged with a contravention of s 3, read with ss1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, read with section 256, 257 and 258 of the Criminal Procedure Act 51 of 1977, (henceforth “Act 51 of 1977”), in that the respondent alleges that on 15 July 2024, the accused inserted his fingers into the vagina of an eight year old child, (“the complainant”).
- [3] Much has been made by the appellant’s legal representative that the court a quo did not state whether this was a Schedule 6 or Schedule 5 bail application. The judgment of the court a quo is clear that the court dealt with the first bail application as falling under the ambit of a Schedule 6 offence and that it was dictated to by the provisions of s60(11)(a) of Act 51 of 1977. [1]
- [4] The appellant was legally represented and adduced evidence by way of a written affidavit, in the first bail application, which was read into the record.
- [5] The appellant has raised the following issues as grounds of appeal, namely that:-
- (a) The Learned Regional Magistrate erred in accepting that the matter fell under Schedule 6 without making a finding on the facts available to him as the nature of the charge is open to interpretation as either rape or sexual assault.
- (b) Even where it to be decided that the bail application fell under Schedule 6, the Learned Regional Magistrate erred in holding that the appellant did not discharge the onus placed on him by Section 60(11)(a) of the Criminal Procedure Act 51 of 1977, (CPA) and that he did not adduce evidence which on a balance of probabilities established exceptional circumstances which in the interests of justice permit his release on bail.
- (c) The Learned Regional Magistrate erred in finding that there is a strong case against the applicant even though he was not convinced that the applicant has been identified as the perpetrator of the offence alleged and as there is no probative evidence identifying the applicant the applicant as the perpetrator.
- (d) The Learned Regional Magistrate erred in not considering that the offence and the injuries on the J88 might have been caused by the father and /or boyfriend of the complainant’s mother as testified on bail on new facts taking into account that the court expressed doubt as to the applicant being linked to the offence.

- (e) The Learned Regional Magistrate erred in finding that the revocation of applicant's refugee status and possible sentence provides incentive to evade trial.
- (f) The Learned Regional Magistrate erred in overemphasising the public outcry over the rule of law and the Constitutional rights of the applicant when he denied bail holding that applicant should be kept in custody for his safety.
- (g) The Learned Regional Court Magistrate erred in according no weight alternatively not sufficient weight to the fact that none of the ground mentioned in section 60(4)(a) – (e) of the CPA was proven.
- (h) The Learned Regional Magistrate erred in refusing to admit the applicant to bail.

Background

- [6] The appellant was arrested on 17 July 2024 and he thereafter made his first appearance on 18 July 2024 in the Regional Court held at Randburg. The first bail application was held on 13 August 2024. On 16 August 2024, the court a quo refused the appellant's application to be admitted to bail.
- [7] On 15 January 2025, the appellant brought a bail application on new facts before the court a quo, which application was also refused.
- [8] During the first bail application, the appellant placed on record that he resides at number 10 Gate Side, Ferndale, number 30 Road House, Chadwell. Furthermore, that he was arrested on 16 July 2024 at Tshabalala Supermarket, house number 1[...], D[...]. The police arrived and arrested him for being in possession of illicit cigarettes. He was then taken to Diepsloot SAPS. He stated that he had no previous convictions or any pending criminal matters. It was stated in the affidavit that he was 35 years old and an Ethiopian citizen with asylum seeker permit number P[...], which had expired on 9 March 2022. Further, that he has no travelling documents and has never travelled abroad since he came to South Africa in 2013.
- [9] It was further stated in the appellant's affidavit that he was born at Omochara clinic, Omochara Village, Hossana, Ethiopia, on 8 August
- 1989. The appellant does have relatives outside the borders of South Africa, in Omochara, Ethiopia, however, he does not have assets outside the borders of South Africa. All his emotional, community and occupational ties are in South Africa. He stated that he is a co-owner of the supermarket at house number 1[...] and was earning R5 000.00 per month. He is single and has no children.
- [10] The appellant's brother is a tenant at 1[...] G[...] S[...], F[...], number 3[...] Road H[...], C[...], and the appellant lives with him for the past seven year. The appellant also owns moveable's to the value of R20 000.00.

- [11] The appellant will plead not guilty to the charges. The appellant further stated that he does not know the identity of the witness and will not interfere with them. He stated that he would comply with any bail conditions imposed and would not jeopardise the objectives or proper functioning of the criminal justice system.
- [12] During the first bail application, the respondent handed in the affidavit of the investigating officer, warrant officer Mokomane Joel Ngobeni. The affidavit sets out that the complainant and her brother were going to school when they passed Tshabalala's spaza shop and that the appellant pushed the complainant inside a small room inside the shop, whereupon the crime was committed. The investigating officer stated that the community of Diepsloot were against the appellant being granted bail.
- [13] The affidavit of Hitirhisi Makamu, who is employed by the Department of Home Affairs, stated that the appellant had applied for asylum in South Africa, however, the section 22 asylum visa had expired on 9 March 2022.
- [14] The respondent called Sarah Mathebula in the first bail application, who testified that she is the mother of the eight-year-old complainant. She did not know the accused and only met him at the police station when the complainant and the complainant's brother pointed him out. This witness requested that bail be refused for the appellant.
- [15] The medical J88 report was handed in marked as an exhibit. The medical J88 states that '... while she was walking with her brother on their way to school on the 11/07/2024 and 12/07/2024 she went to the shop to buy sweets when the shop owner took her to a room, kissed her on her forehead and inserted his fingers on her genitalia. He then threatened that if she told anyone, he was going to call the police.' [my emphasis]
- [16] The medical report states further that:
- 'There is evidence of blunt trauma injury on the external genitalia' and further that on the navicularis, there is 'laceration and redness'.

Legal Principles

- [17] Section 60[11](a) of Act 51 of 1977 states:

'Notwithstanding any provision of the Act, where an accused 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 on bail.'

- [18] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances' has meant different things to different people. In *S v Mahommed*,^[2] it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary

meaning is simply: ‘unusual or different’. The secondary meaning is ‘markedly unusual or specially different’. In the matter of Mahommed,[3] it was held that the phrase ‘exceptional circumstances’ does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist ‘which in the interests of justice, permit his or her release’. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently

unusual or different in any particular case as to warrant the appellant’s release on bail.

[19] In so far as the weakness of the State’s case in a bail application is concerned, the Supreme Court of Appeal in the matter of S v Mathebula[4] held that:

‘...to successfully challenge the merits of the State case in bail proceedings, the applicant must prove on a balance of probability

that he will be acquitted of the charge.’[5]

[20] In the matter of S v Smith and Another,[6] the Court held that:

‘(f) the appellant failed to testify on his own behalf, and no attempt was made by his counsel to have him testify at the bail application.

There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.’ [7]

[21] In S v Bruintjies,[8] the Supreme Court of Appeal stated that:

‘The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.’[9]

[22] In Mathebula,[10] the Supreme Court of Appeal stated that:

‘In the present instance, the appellant’s tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive.’[11]

Evaluation

[23] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong[12]

[24] The appellant bears the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit their release. A mere denial of the considerations and/or probabilities of events, as contained in s60 (4) – (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.

- [25] The appellant did not present viva voce evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of Bruintjies[13] and Mathebula,[14] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen this. As a result, the State could not cross-examine the appellant to test the veracity of the averments in his affidavits. This affects the weight to be attached to the averments made in the affidavits as the probative value of the affidavits could not be tested.
- [26] The court a quo's judgment pertaining to the first application dealt fully with the issues presented during the bail application. Most importantly, the court a quo stated that even though the asylum status of the appellant was revoked and even though such a decision was on judicial review, the fact that South Africa's borders were porous, the appellant, if granted bail, could still flee out of the country.
- [27] During the appeal, this court asked the appellant's attorney when the appellant came to South Africa and when did the appellant apply for asylum seeker status. Unfortunately, the appellant's attorney had no further information regarding this Court's questions. The appellant's attorney could also not address the court when the appellant entered South Africa.
- [28] Much has been made of the fact that no identification parade was held to identify the accused. The fact remains that as per the J88 medical report, the appellant was known to complainant and if she pointed the accused out at the police station, there is no need to then hold a further identification parade.
- [29] Sections 60(4)(b) and (d) of Act 51 of 1977 are of importance in the matter in casu. The sections state the following:
- '60(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established: ...
- (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...
 - (d) where there is the likelihood that the accused, if he or she were released in bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;...'
- [30] In considering whether the ground in subsection (4)(b) of Act 51 of 1977 has been established, the court may, where applicable, take into account the factors referred to in s60(6) of Act 51 of 1977, namely:
- '(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached.'

First bail application

[31] This court cannot find any fault with the reasoning of the court a quo in regard to the judgment handed down during the first bail application based on the following facts:

- (a) The appellant is unmarried and apart from his brother living in South Africa, the appellant has no other emotional ties in South Africa. In fact, the appellant's entire family lives in Ethiopia.
- (b) The appellant does not own any immovable property in South Africa. His only assets are furniture, appliances and household effects, to the value of R20 000.00.
- (c) There is no evidence as to how and when the appellant entered South Africa. As a result, the appellant may use the same method used, to enter South Africa, to also exit South Africa. There is no alternative address given where the appellant could reside if granted bail and accordingly, the binding effect and enforceability of bail conditions may be breached.
- (d) Should the appellant be found guilty of rape, a term of life imprisonment may be imposed. In the event that the appellant is found guilty of sexual assault, a term of life imprisonment will most probably be imposed.
- (e) The complainant identified the appellant. The brother of the complainant was also present when this incident occurred. Therefore, as regards to identity, the State will most probably have two identifying witnesses.

Bail Application on New Facts

- [32] In the bail application on new facts, the appellant called a witness who testified that the complainant and her witness were physically abused by their father. This witness is the brother to the complainant's mother and is the complainant's uncle.
- [33] In summary, the new facts presented by the appellant before the court a quo were that:
- (a) The complainant is no longer in Gauteng;
 - (b) There is no more media or public interest in this matter, and
 - (c) There is allegation that the complainant's father abused the complainant.
- [34] During the bail application on new facts, the State called the investigating officer who testified that he had interviewed the complainant and her brother on 11 November 2024 and that they never told him about the abuse by their father. The children only spoke about the accused.
- [35] The new fact of the complainant's father abusing the complainant does not assist the appellant. It is very strange that the witness called by the appellant, who knew of the alleged abuse by the complainant's father, lay no charge against the complainant's father and never approached the investigating office to report the complainant's father.
- [36] After a perusal of the record of the court a quo, this Court finds that there is no persuasive argument to release the appellant on bail. The appellant has not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail. Accordingly, there are no grounds to satisfy this court that the decision of the court a quo was wrong.

Order

- [37] In the result, the appeal of the appellant is dismissed.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF APPELLANT: Mr MC Molefi (with right of appearance)

Instructed by Leseka Molefi Attorneys Inc

ON BEHALF OF THE STATE: Adv. F Mahomed

Instructed by the Office of the National

Director of Public Prosecutions, Johannesburg

DATE OF HEARING: 15 May 2025

DATE OF

JUDGMENT:

28 May 2025

- [1] CaseLines 003-60 line 3-4 and lines 13-15
- [2] S v Mahommed 1999
- (2) SACR 507 (C)
- [3] Ibid
- [4] S v Mathebula 2010
- (1) SACR 55 [SCA]
- [5] Ibid para 12
- [6] S v Smith and Another 1969 (4) SA 175 (N)
- [7] Ibid pg 177 para E – F.
- [8] S v Bruintjies 2003
- (2) SACR 575 (SCA)
- [9] Ibid para 7
- [10] Mathebula (note 4) above
- [11] Ibid page 59 B-C
- [12] S v Rawat 1999
- (2) SACR 398 (W).
- [13] Bruintjies (note 8 above)
- [14] Mathebula (note 4 above)

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