

SOUTH AFRICA / JUDGMENT

R.B and Another v S (Bail Appeal) (A74/2024) [2025]

ZAWCHC 216 (23 May 2025)

[2025] ZAWCHC 216

COURT

Western Cape High Court, Cape Town

BEFORE

Mapoma

CASE / FILE NUMBER

A74/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN CAPE DIVISION,

CAPE TOWN)

Appeal Case No.: A74/2024

Lower

Court Case No: A618/2024

In the matter between:

R[...]

B[...]

First Appellant

G[...] L[...] B[...]

Second Appellant

and

THE

STATE

Respondent

Coram:

MAPOMA AJ

Heard: 14 May
2025

Electronically Delivered: 23 May 2025

JUDGMENT

MAPOMA AJ

Introduction

- [1] This is a bail appeal against the decision of the Magistrate, Atlantis (the court a quo), refusing to grant after pending trial. The appellants are a married couple. The husband and wife aged 47 and 38 respectively. They are facing 15 charges at the magistrate's court ranging from kidnapping, trafficking in persons for the purpose of exploitation, sexual assault, assault, rape, possession of drugs, attempted murder and unlawful possession of ammunition.
- [2] These offences are alleged to have been perpetrated on the 26-years old woman (the complainant), and to the appellants' own biological 5-years old child. At the relevant time, the complainant was the employee of the appellants. The charges involve certain offences that fall under Schedule 6 of the Criminal Procedure Act 55 of 1977 (the Act), and as such, the bail hearing was one to be conducted under section 60(11) of the Act. Section 60(11) of the Act provides that in schedule 6 offences 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.
- [3] The bail appeal was opposed by the respondent on the grounds that there are no exceptional circumstances which in the interest of justice permit the release of the appellants on bail.

Relevant Background Facts

- [4] The appellants were arrested on 31 October 2024 at their place of residence in Melkbosstrand, Cape Town on the strength of the allegations of inter alia kidnapping, trafficking, sexual exploitation, physical and emotional abuse levelled by the complainant against them. The complainant's allegations are also that she witnessed the second appellant committing sexual abuse of her own 5-years old child by inserting a finger on her anus. These allegations are denied by the appellants.
- [5] Pursuant to the arrest of the appellants, their two biological children, namely, a 5-years old girl and a 4 months' old breast-feeding baby boy, were taken away from the appellants and placed in the care of the officials of the Department of Social Development. The minor children were in turn taken to the Thuthuzela Care Centre at Victoria Hospital in Wynberg,

where they were medically examined. No physical injuries were found on the baby boy. The examining medical practitioner made clinical findings on the minor girl to the effect that there was partial transection at 4 o'clock of the hymen and tear in anal orifice which healed as a scar at 11 o'clock, which according to the doctor, were in keeping with possible blunt force penetration of anal and genitals. The doctor further reported that healing had taken place and that these would be older injuries.

- [6] Having heard the oral evidence of the appellants, which was foreshadowed by their respective affidavits with annexures, and further having considered the affidavit with annexures, of Lieutenant Colonel Speed of the Directorate of Priority Crime Investigation (DPCI) of the South African Police Services (SAPS), on 21 February 2025, the magistrate refused bail.
- [7] In refusing bail, the magistrate held that the appellants had been afforded more than enough reasonable opportunity to present their case but failed to discharge their onus of proving that exceptional circumstances exist, which in the interests of justice, permit their release on bail. The court a quo rejected the appellant's submission that the complainant was voluntarily traveling across the borders of South African during the course and scope of her employment. The court a quo took a view that the complainant was not travelling on her own steam but had been recruited, transported and harboured against her will. The court also rejected the appellants argument with regards to the rape charge, that the sexual intercourse between the complainant and the first respondent was consensual, backed by the so-called 'sex contract' that was concluded between the appellants and the complainant on 30 June 2024.

Appellants case for bail

- [8] In summary, the appellants' testimony as contained in the respective affidavits read into the record and supported by their oral evidence, is that they are a married couple residing at the property owned by the first appellant, situated at [...] A[...] Way, Atlantic Beach Estate, Melkbosstrand, Cape Town. The first appellant has another immovable property at Potchefstroom, Gauteng province.
- [9] The first appellant is a South African citizen, who has been in steady employment in the management of M[...] C[...], which is owned by a management company called B[...]. Although he spends a fair amount of time working abroad in Qatar, Dubai and United Arab Emirates (UAE), he regards South Africa as his permanent home and domicilium, where he raises his children. The second appellant is a British citizen, who is in the process of applying for renewal of her Visa and permanent residence in South Africa. She resides with the first appellant at the abovementioned address in South Africa.

She owns an events management company R[...] E[...] that is registered in Qatar, which she operates remotely whilst in South Africa.

[10] Both appellants have no previous convictions, no pending cases against them and no outstanding warrants of arrest. They deny all the allegations made by the complainant against them and intend pleading not guilty to all the charges. In their testimony in the court a quo, the appellants mounted a detailed account on the presented facts in denial of the allegations in an endeavour to illustrate that

the complainant is not telling the truth. The appellants contend that the allegations are false, and that the allegations were made by a complainant whose credibility is wanting. On this basis, they contend that the respondent's case is so weak that there are no reasonable prospects of successful prosecution, and that this on its own constitutes exceptional circumstances, which in the interests of justice, justify their release on bail.

[10] The first appellant testified that they are a close-knit nuclear family with two biological minor children aged 5 years and 4 months old. He also has another adult daughter from previous marriage. He also testified that on or about 16 October 2024, while he was at work in Dubai, the second appellant and their two minor children were taken by the social workers to the Westfluer Thuthuzela Care Centre for medical examination of the children upon allegations made that the second appellant had sexually abused her 5 years old daughter as mentioned above. After the second appellant and children were subjected to medical checkup and permitted to return home, the second appellant contacted the first appellant and told him that she had been informed by the social workers that the complainant had laid criminal charges against them. The first appellant took the earliest possible flight from Dubai on 25 October 2024 and returned to South Africa.

[11] On 31 October 2024, the appellants were arrested at their home. After the appellants' arrest, their two minor children were taken from home and placed in the care of the officials of the Department of Social Services, who took them to the Thuthuzela Care Centre, Victoria Hospital, Wynberg for another medical examination as mentioned earlier in this judgment. Regarding the injuries reported on the child, their explanation is that sometime earlier, they discovered that the child was abused by a certain Mr Bulbul whose access to the child was their helper whom they dismissed as a result of that act. No criminal charges were pressed against the said Mr Bulbul.

[12] Both appellants deny that they are flight risks. In this regard, the first appellant argues that, whilst he has residence permit in countries outside South Africa, he came to South Africa upon being notified that the complainant has laid criminal charges against them notwithstanding that he could have remained abroad and evade arrest. In addition to this the appellants committed themselves to accept and abide by bail conditions, no matter how stringent such conditions are. In this regard, they urged the court to consider as one of the conditions of bail that the property they use as common home in Melkobosstrand be used as security against bail.

Respondents case

[13] The state opposed bail mainly on the grounds that the appellants had failed to prove exceptional circumstances, which in the interest of justice, permit their release. The state contended that the appellants are closely linked to the charges and that they face possible life imprisonment given the serious nature of the charges they face. The state further contended that the interests of justice militate against the release on bail, in that, the appellants are have international travel and permanent residence status abroad and as such are a flight risk; that they face a possible life sentence which would deter them not to stand trial; that there is likelihood that they would endanger the complainant; and that their release is not in the public interests in that the public will lose confidence in the justice system interest.

Grounds of Appeal

[14] On appeal, the broad stroke of the appellants' case is that the magistrate misdirected herself in several respects including that she:

- i) incorrectly applied the burden of proof in respect of this exceptional circumstances;
- ii) failed to appreciate the weaknesses in the state case;
- iii) incorrectly applied the legal principles and facts relating to the assessment of flight risk and therefore, erroneously held that the appellants were flight risks;
- iv) failed to properly consider and assess the appellants' personal circumstances;
- v) failed to consider the fact that the appellants testified under oath, were cross examined and therefore their evidence carried more weight than that of the state witness whose evidence was tendered by way of affidavit.
- vi) failed to consider bail conditions that included the undertaking by the first appellant to give up his property as security for him to attend trial.

[15] According to the appellants, each of the contended misdirections, taken separately or cumulatively, justify that this court set aside the decision of the court a quo and admit the appellants to bail.

Applicable Legal Principles

[16] In determining a bail appeal, the Court is governed by the provisions of Section 65 of the Act. Section 65

- (4) 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.

- [17] The court in *S v Barber* 1979(4) SA 218(D) outlined the guiding principle regarding the approach the Appeal Court should adopt in determining when to interfere with the decision of the court a quo as follows:

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of his discretion. I think it should be stressed, that no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

- [18] Applying the principle in the Barber decision, in *S v Mbele and Another* 1996 (1) SACR at 221, para H, the court held that a court considering the appeal is required to approach the appeal on the assumption that the decision of the Court below was correct and not to interfere with that decision unless “satisfied” that it was wrong.
- [19] The onus in schedule 6 bail application is on the appellant to prove, on the balance of probabilities, that exceptional circumstances exist which, in the interest of justice, permit his release on bail.

Analysis

Exceptional Circumstances

- [20] It is trite that the applicant for bail bears the onus to prove, on a balance of probabilities the exceptional circumstances exist, which in the interests of justice, permit that she or he be released on bail. (See *S v Yanta* 2006 (1) SACR 737 (Tk; See also *S v Botha and Another* 2002 (1) SACR 222 (SCA). Exceptional circumstances do not have a standard definition. In essence, depending on the facts of each case, the court is expected to exercise value judgement in accordance with all the relevant facts and circumstances and with reference to all the applicable legal criteria. (*S v Peterson* 2008(2) SACR 355 (C) at para [55].
- [21] In determining whether exceptional circumstances exist, during bail proceedings, the court is not required to make any findings, even on a provisional basis, about the applicant’s guilt or any amendment to the bail conditions. All that a court must do is weigh the prima facie strength or weakness of the state’s case, and such a decision ought not to be made regarding credibility findings so that bail proceedings do not become a dress rehearsal for the trial itself. (See *S v Viljoen* 2002 (2) SACR 550 (SCA) at para 25).
- [22] In casu, the exceptional circumstances relied upon by the appellants are mainly that the state case is exceptionally weak on the merits of the charges against them. It is further contended that the cumulative weight of factors under section 60(4) of the Act, read

with subsection (5) to (8A); subsection (9) and (10) favour the appellants' release on bail.

[23] Without overlooking the other relevant issues, the central issue to be determined in this bail appeal is whether the magistrate failed to properly consider that the weakness or otherwise of the state case, as to whether it is so weak that there are no reasonable prospects of successful prosecution. Further, whether this on its own constitute exceptional circumstances, which in the interests of justice, permit that the appellants be released on bail.

[24] Where an accused adduces independent evidence of innocence and such evidence is so strong that it can be said that there are reasonable

prospects of success at trial, he has established exceptional circumstances. See *S v Mohammed* 1999 (2) SACR 507 (C). However, in order to successfully challenge the merits of such a case in bail proceedings, an applicant must prove on a balance of probabilities that he will be acquitted of the charge. See *S v Botha* 2002

(1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* (supra) at 556.

[25] The record shows that in an endeavour to discharge the onus, the appellants led viva voce evidence and subjected themselves to cross-examination, more and above the affidavits that they submitted. They further introduced documentary evidence in the form of whatsapp messages and pictures from the complainant's cellular phone, showing inter alia, the complainant's happy moments with the first appellant in Dubai and other countries in Europe that include Portugal and Spain to demonstrate that the complainant was not kidnapped, and that her cellular phone and laptop were with her and she had free access to internet and moved around at will. It does not appear that these pictures were disputed. They also led evidence of employment contract with a salaried personal assistant and operations manager second appellant, and that the employment contract was terminated on 19 September 2024. The appellants also submitted the so-called "sex contract" that was concluded with and signed by the complainant to illustrate that the complainant had a consensual sex with the first appellant.

[26] The appellants submitted evidence to illustrate that the complainant travelled on her own from the various countries abroad and to and from South Africa during the course and scope of her employment, at the travel costs paid by the appellants. One of such trips, as shown by the evidence, is when the complainant travelled from Qatar to Cape Town, where she underwent breast augmentation surgery paid for by the appellants. Ironically, the affidavit of the Warrant Officer Speed states that the complainant stayed at her home with her family and sometimes with her boyfriend when she was in Cape Town.

[27] The appellants also presented independent evidence in the form of affidavits backed by documentary evidence deposed to by nine (9) witnesses in an endeavour to refute the state version that the complainant was held against her will. Part of that evidence is the affidavit of the complainant's sister, who states that she stayed with the complainant and the

appellant at the appellants' places both in South Africa and abroad during the relevant period, that is, May 2024. She denies that her sister was kidnapped, harboured or raped. The appellants contend that complainant is lying because she is resentful of having lost her job. Another evidence the appellants placed before court was an affidavit to the effect that the complainant was once involved in a crime of impersonation of a jockey in 2023 while she was working in the horse racing industry and is currently being sued for repayment of that money. The appellants submitted that the state case is exceptionally weak, as it relies only on the complainant as a single witness whom they illustrated as lacking in credibility. They contend that they had have proved on a balance of probabilities that they will be acquitted on trial.

- [28] In dealing with the contended weakness of the state case, the magistrate did not properly direct herself to the case placed by the bail appellants before her, namely, to determine whether the state case is weak. Instead, the magistrate took a view that the evidence was irrelevant to those proceedings. Consequently, nowhere in the judgment does that magistrate make an objective assessment of the evidence mounted by the appellants in their attempt to discharge their onus on a balance of probability that they will be acquitted of the charges. I consider this a serious misdirection in my view.
- [29] The magistrate went at length to consider the allegations made by the state against the appellants and gave no regard to the evidence placed by the appellant before court to illustrate weakness in the state case. In pursuit of that route, she erroneously made findings of fact on one of the very charges that are contested and yet to be determined of trial, where she found as follows: "In the circumstances, the court will accept that the complainant was hidden and or concealed by the applicants for the purposes of exploitation as evidence before the court suggests... (sic)." Accordingly, I consider the magistrate to have misdirected herself and employed the incorrect approach in this regard.
- [30] It is my considered view that had the magistrate directed herself in determining whether or not, based on the facts placed before her, the strength of the state case is weak as to constitute exceptional circumstances, she would have found that the state case at least at this stage, and to the extent that its strength lies on the allegations of the complainant alone, is weak to secure conviction. Naturally this would have counted favourably to the appellants because proof by an accused that she or he will probably be acquitted on trial can serve as exceptional circumstances. As such, the strength of the state case is relevant to the determination of the existence of exceptional circumstances. (See *Woji v Minister of Police* 2015(1 SACR 409 (SCA) at para [3].

Interests of justice

- [31] Section 60(4) of the Act enumerates the grounds which, if one or more are established, the interests of justice do not permit the release of the accused on bail. This section has to be considered and applied conjunctively with section 60(9) which 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 or her 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, a number of factors. These factors include any other factor which, in the opinion of the court, should be taken into account.

[32] In opposing the appeal, the respondent relied heavily on the contention of the interests of justice as enumerated in the provisions of section 60(4). This subsection provides that:

‘(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:

- (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;
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public peace or undermine the public peace or security;”

[33] The state submitted that the appellants are a flight risk. In advancing this contention the state argued that in terms of section 60(4)(b) there is a likelihood that the appellants, if released, will attempt to evade trial based on their international status that include having permanent residence in Qatar and UAE.

[34] The appellants testified that they own properties in Melkbosstrand, Cape Town in which the appellants reside as a common home, and in Potchefstroom, Gauteng in South Africa. In my view, the fact that the appellants have access to the international world should not without more unduly deprive the bail appellant of their constitutional right to liberty. In my view, objective facts, gleaned from the conduct of the appellants, must show that they are a flight risk. In this case, the scale tilts to the appellant’s favour. If the first appellant was a flight risk, he would not have flown back to South Africa after having been made aware that serious charges had been laid against him. Same as the second appellant, she would not have remained in South Africa with her VISA status, knowing that criminal charges have been laid against her and her permanent residence was about to expire. The second appellant knew days before they were arrested that the complainant has laid criminal charges against them. As I stated above, that motivated the first appellant to take the first available flight back home and face the charges.

- [35] It was further submitted by the state that in terms of section 60(4)(c), there is likelihood that the appellants, if released, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. This argument is buttressed on the contention inter alia, that because the appellants know the complainant and their own daughter, they are likely to interfere with them and destroy evidence. It is also argued that in terms of section 60(4) there is the likelihood that the release of the appellants will undermine public confidence in the criminal justice system.
- [36] I have carefully considered the concerns raised by the state in opposing bail appeal in this matter. This is more so with reference
- to the requisites set out in the provisions of section 60 (4) (a) to
- (e) of the Act. In the consideration of the question in section 60
- (4) of the Act, due regard must be had that the Act requires the listed criteria set out (a) to (e) to be established. I am not persuaded that the contended “likelihoods” advanced against the appellants are based on established facts as required by the statute. Travesty of justice might arise if the application of the criteria set out in section 60(4)(a) – (e) are based on sheer conjecture and speculation.
- [37] Bearing that in mind the not so strong merits of the state case against the appellants, and the provisions of section 60(9) which require that in considering the requisites set out in section 60(4) the interest of justice have to be weighed against the right of the appellants to their personal freedom, and particularly prejudice they are likely to suffer if they remain in custody, my view is that the interests of justice are tilted in favour of the release of the appellants on bail. In order to safeguard the interests of justice, particularly the contentions by the state, it is appropriate that the court grant bail with stringent conditions.
- [38] My view is fortified by the provisions of section 60(9)(g) of the Act which require the court to, in considering the question of the interests of justice weigh same against the rights of the accused person’s personal freedom and, in particular, prejudice he or she is likely to suffer if detention in custody were to continue, taking into account inter alia, any other factor that in the opinion of the court should be taken into account. In my view, one such factor, which in the opinion of the court should be considered are the interests of the appellants’ minor children and their mother in this case.
- [39] Section 28(1)(b) of the Constitution guarantees every child the right to family care or parental care, or alternative care when removed from the family environment. Sub-section (2) of this section provides that the child’s best interests are of paramount importance in every matter concerning the child. While the issue has not been raised as a ground of appeal, this court as an upper guardian of the minors is charged with constitutional obligation to ensure that in a matter like the present, the court considers as paramount what is in the best interest of the children. In particular, the court is obliged to consider whether the facts justify incarceration that results in the children being separated from parental care

due to such incarceration.

[40] On the facts placed before this Court the children were medically examined. There was nothing medically untoward found concerning the 4 month's old child as to warrant her removal from its mother. On the medical findings on the five-year old, the doctor reported that healing had taken place in her genitalia and anal region and that the scars would be older injuries. The evidence of the appellants regarding the injuries on their child was that sometime earlier, they discovered that the child was abused by a certain Mr Bulbul whose access to the child was through their helper whom they dismissed as a result of that act. It does not appear that this evidence was challenged.

[41] In my view, the present situation, where children as young as 4 months and five years are being removed from their mother in circumstances of this case, carries weight as exceptional circumstances that should have been considered. This is more so on the strength of the allegations made only by the complainant.

[42] In conclusion, having regards to the totality of the evidence and the relevant factors, I am satisfied that the appellants have succeeded in discharging their onus and have proved on a balance of probabilities that exceptional circumstances exist, which in the interests of justice, permit their

release on bail. Such release will be best suited if it is qualified with bail conditions as is the requirement in terms of Section 35 (1)

(f) of the Constitution.

Order

In the result, I make the following order:

1. The appeal is upheld, and the magistrate's refusal to grant bail is set aside and substituted as follows:

1.1. The first and second appellants are granted bail in the amount of R50 000 each, with the following conditions:

1.1.1. The first appellant, as registered owner of the immovable property known as Erf 4[...], City of Cape Town, located at [...] A[...] Way, Atlantic Beach Estate, Melkbosstrand, Cape Town shall submit this property for a caveat to be registered against the property as security for bail;

1.1.2. The appellants shall reside at [...] A[...] Way, Atlantic Beach Estate, Melkbosstrand, Cape Town during the period of operation of these bail conditions;

1.1.3. The appellant shall not leave the magisterial district of Cape Town without the permission of the magistrate in this case;

1.1.4. The appellants shall report to the Investigating Officer in this case on every Monday and Friday of each week, between 8h00 and 12h00 until the trial is finalised;

1.1.5. The appellants may not have direct or indirect contact with the complainant or any other witness for the state in this matter;

1.1.6. The appellants shall attend court for trial and on all remand dates, unless excused by court for any other reasons including medical reasons;

1.1.7. The appellants international passports shall be handed in and or/ retained to the respondent for safekeeping until the finalisation of trial.

MAPOMA AJ

Acting Judge of the High Court

Appearances:

Counsel for the First Appellant : Adv R Liddell

Counsel for the Second Appellant : Adv Van der Berg

Instructed by

: Liddell Weeber & Van der Merwe, Cape Town

Counsel for the Respondent : Adv Kortje

Instructed by

: Director of Public Prosecutions

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