

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION, MAKHANDA)**

Case no: CA&R 92/2024

In the matter between:

**NKOSIKHONA ROGERS WILLIAMS** Appellant

and

**THE STATE**  Respondent

**BAIL APPEAL JUDGMENT**

**GQAMANA J**

[1] This is an appeal in terms of section 65 (1) of the Criminal Procedure Act, 51 of 1977 (the

CPA) against refusal by the magistrate to admit the appellant to bail. The appeal is opposed by the

State.

[2] In terms of section 65 (4) of the CPA, this Court shall not set aside the decision against

which the appeal is brought, unless it is satisfied that the decision was wrong. The powers of this

court to interfere with the decision of the magistrate are largely limited. Although this Court may

have a different view, but it should not substitute its own views for that of the magistrate, because

that would be an unfair interference with the magistrate’s exercise of discretion.[[1]](#footnote-2)

[3] In the matter at hand, the appellant is charged with a Schedule 5 offence (murder).

According to the provisions of section 60 (11) (b) of the CPA, the onus is upon the appellant to

adduce evidence which satisfies the court that the interests of justice permit his release.

[4] At the bail hearing the appellant presented his evidence in the standard form affidavit. His

personal circumstances as set out therein are as follows: he was 33 years of age and unmarried.

He has three minor children. He was gainfully employed as a school transport driver earning an

income of R1 500 per month. He used his income to support his children. He has no pending

cases, or outstanding warrants of arrest. He has no previous conviction. He handed himself over

to the police and was arrested on 2 December 2023. He intends to plead not guilty. He confirmed

under oath that, he had made no threats to anyone, nor did he harbor resentment against anybody.

[5] However, the main basis for the State to oppose his bail application is that the appellant

had threatened witnesses. Captain Fete, in his affidavit, made an allegation that information came

to him that the appellant threatened witnesses. That evidence was in conflict with the allegations

made by the appellant in his affidavit. Not much evidence was presented about this alleged threat

to witnesses. Apparently, the witnesses reside in the same vicinity with the appellant.

[6] The reasons for refusing bail are scant but clear. The magistrate considered the prevalence

of this type of offence in the area concerned, the degree of violence used during the commission

of this offence and the likelihood that the appellant would intimidate witnesses. The magistrate

further held the view that the release of the appellant on bail would cause an outcry in the

community.

[7] There are seven grounds of appeal as set out in the notice of appeal. However, the gist of

the submissions on behalf of the appellant is that the magistrate misdirected herself in finding that

it was not in the interests of justice to permit the release of the appellant on bail. It was further

submitted that the magistrate failed to take into account the interest of the appellant’s minor

children.

[8] The magistrate is deaf silent on the interest of appellant’s minor children. There is no

evidence on whether the appellant is the primary care giver of his minor children. It does not appear

that this issue was considered at all by the magistrate. To the contrary, it appears that the magistrate

over-emphasised the prevalence of the offence and degree of violence and placed no regard to the

appellant’s personal circumstances and the interest of his minor children.

[9] In a bail application, the magistrate must consider all the relevant aspects for and against

the granting of bail. It was wrong for the magistrate to over-emphasise aspects which militate

against the granting of bail, whilst aspects in favour of the appellant were not given sufficient

weight. In addition, it was crucial for the magistrate to have evidence on the interest of the

appellant’s the minor children before she could make a decision whether to refuse or grant bail. It

is clear from section 60 (10) that the court’s function in bail application is intended to be more

proactive than in a normal criminal proceedings.[[2]](#footnote-3)Further the magistrate should have allowed the

appellant to adduce rebutting evidence on the alleged intimidation or threats to witnesses,

especially that there were conflicting allegations on this issue between the affidavit of the appellant

and that of Captain Fete.

[10] In light of these misdirections, the decision of the magistrate was wrong, and the appeal

ought to succeed. However, due to lack of evidence on the interest of the minor children and the

alleged threats to witnesses, the appropriate order would be to remit the matter for the magistrate

to hear evidence on such issues and to consider the bail afresh after hearing such evidence.

[11] In the circumstances, the following order is issued:

1. The appeal is upheld.

2. The decision of the magistrate, in the bail application is set aside and the matter is remitted to the same magistrate to consider the bail application afresh after hearing evidence on the appellant’s minor children’s interest and the alleged threats to witnesses.

3. The State is to be afforded the opportunity to adduce further evidence in response to any further evidence presented by the appellant.

4. The appellant shall remain in custody pending the finalisation of the bail application by the magistrate.

**N GQAMANA**

**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Counsel for the Applicant : *Mr A Mgangatho*

Instructed by : Mgangatho Attorneys,

Makhanda

Counsel for the Respondent : *Adv A A Nohiya*

Instructed by : Director of Public Prosecutions

Makhanda

Date heard on : 12 June 2024

Delivered on : 12 June 2024

1. S v Wardle, (unreported, ECP case no. CA&R 5/2018, 10 May 2018) and S v Panayiotou (unreported, ECG case no. 06/2015, 28 July 2015). [↑](#footnote-ref-2)
2. Sv Green and Another 2006 1 SACR 603 (SCA) at 610b. [↑](#footnote-ref-3)