Editorial note: Certain information has been redacted from this judgment in compliance with the law.

OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO. CA & R 15/2010

Date of Application : 4 June 2010

Date of judgment : 23 July 2010

In the matter between

WILLEM FREDERICK JOHANNES VAN WYK	First Appellant
CORNELIA MAGRIETA VAN WYK	Second Appellant
LOUISA ANTOINETTA SUSANA MAGDALENA VAN WYK	Third Appellant

and

THE STATE	Respondent

JUDGMENT

HARTLE, A J:

[1] This is an appeal against the refusal by a magistrate in Port Elizabeth on 26 January 2010 to admit the Appellants to bail.

[2] The appeal was only noted on 20 April 2010 but the Appellants sought leave to condone the late filing thereof and the prosecution of the appeal. Since there was no opposition to the application, I granted the relief sought.

[3] The main ground for the appeal was the contention that the magistrate had misdirected himself in finding that the Appellants were charged with a Schedule 6 offence which, so it was contended, resulted in a misapplication of the onus of proof. Other grounds related to the manner in which the magistrate applied the evidence, or failed to apply it, in relation to the applicable legal principles.

[4] With regard to the Third Appellant, it was contended that the magistrate had erred in failing to find, on the State's own case, that she was not involved in the commission of the alleged offences and that there was not "*a shred of evidence*" implicating her in this regard. Ms *Loots*, who appeared for the state, acknowledged as much during argument. As a result of her concession in this regard, I instantly ruled in the Third Appellant's favour that her appeal succeeds and that she be released on her own recognizance's forthwith. Judgment was reserved in respect of the First and Second Appellants.

[5] The First and Second Appellants are married to each other. The Third Appellant is the older sister of the Second Appellant, and the ex-wife of the First Appellant.

[6] The charges preferred against the Appellants[1], as reflected on the face of the charge sheet are the following:

> "1) Sexual exploitation of children;
> 2) sexual grooming of children;
> 3) exposure of pornography to children;
> 4) causing children to witness sexual acts".

[7] The annexure to the charge sheet repeats what is stated on the face of the J15, without any detail as to dates, places, events or persons. There is also an absence of any reference to the applicable legislation under which the Appellants were charged.

[8] The First and Second Appellants' formal bail application proceeded on 7 January 2010. At the outset thereof Mr *Roelofse*, who first appeared on their behalf, noted that there was a difference of opinion between him and the prosecutor concerning whether the charges resorted under Schedule 5 or 6 to the Criminal Procedure Act, No. 51 of 1977. He thought that Schedule 5 was

[1] Initially only the First and Second Appellants were arraigned on these charges. They were arrested on 23 December 2009. The Third Appellant was joined as an accused on 15 January 2010, ostensibly charged with the same offences.

applicable; the prosecutor Schedule 6[2]. His initial submissions in this regard were recorded as follows:

> "Die rede hoekom ek so sê, Skedule 6 verwys na verkragting en Du Toit … praat hulle van "rape". Hulle sê hierso waar dit verkragting is waar die "victim":
>
> > "*Where the victim is a girl under the age of sixteen, where she is physically a disabled woman or mentally ill woman."*
>
> Nou Edelagbare u sal merk met die klagtes en die Staat kan dit bevestig, wat gestel word, is dit inderdaad so dat hulle beweer dat daar wel dogters ter sprake is wat onder die ouderdom van sestien is, maar dat daar op geen stadium enigiets plaasgevind het sonder toestemming nie en van daar 'n klagte van statutêre verkragting gestel is. Dan soos uself weet is statutêre verkragting net nie verkragting nie. Die wetgewer maak 'n onderskeid tussen verkragting en statutêre verkragting en indien die wetgewer statutêre verkragting as 'n Skedule 6 klagte wou stel, sou hy dit pertinent genoem het onder Skedule 6 wat inderdaad nie so gedoen is nie. Alles word behandel onder die hoof van verkragting en nêrens word daar melding gemaak deur die wetgewer dat statutêre verkragting ook daaronder resorteer nie."

[9] He pointed to the difference in degree of evidential burden which the Appellants would have to bear, depending on whether they were charged with an offence referred to in Schedule 5 or Schedule 6, but accepted, in either case, that they bore the onus[3]. The prosecutor contended that Schedule 6 was applicable

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[2] From the record it appears that his arguments were premised on "… *wat die Staat inderdaad gaan aanbied as getuienis van Staatskant af ter oponeering van hierdie aansoek …*" rather than on the limited information appearing in the charge sheet. It is reasonable to assume that he must have had insight into the affidavit of the investigating officer which the State ultimately tendered in evidence.

[3] Section 60(11) of the Criminal Procedure Act provides that "(n)*otwithstanding any provision (*thereof*), 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 interest 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."

because the complainants, who were under the age of 16 years, could not have lawfully given permission.

[10] The magistrate promptly ruled that Schedule 6 was of application. His reasons were stated as follows:

> "Die Hof moet nou hier beslis of hierdie 'n Skedule 5 of 'n Skedule 6 misdryf is. Die bewyslas tussen die twee verskil. Volgens die Hof se inligting wat hier aan die Hof meegedeel is, is dit meisiekinders tussen die ouderdome van tien and vyftien betrokke… 'n dogtertjie onder die ouderdom van twaalf … word dit geag dat sy nie toestemming tot geslagsgemeenskap kan gee nie as sy onder die ouderdom van twaalf jaar is. Derhalwe in hierdie geval beslis die Hof dus dan hierdie as 'n Skedule 6 misdryf." (sic)

[11] This ruling set the tone for the premise that both Appellants should satisfy the court that exceptional circumstances existed which in the interests of justice permitted their release in terms of section 60(11)(a) of the Criminal Procedure Act.

[12] Despite the magistrate's ruling on onus, the prosecutor commenced the enquiry by tendering into evidence an affidavit deposed to by Captain *Michael Coenraad Grobler*, the investigating officer in the matter. In addition, she made certain submissions in support of the State's opposition to the application for bail. These were that: the investigation was far from complete; there was a possibility that the Appellants would interfere with the investigation, they might possibly commit suicide and, in addition, were flight risks. Because of the children's ages, their lack of parental supervision and poor economic circumstances, she contended that they were particularly vulnerable to influence from the Appellants. The State's case was thereupon closed.

[13] Except for lamenting at some stage later during the proceedings that he would not be afforded an opportunity to cross examine Captain *Grobler*, Mr *Roelofse* offered no demur to the introduction of the latter's evidence by way of affidavit[4].

[14] In his lengthy affidavit, deposed to on 6 January 2010, Captain *Grobler* fleshed out the charges against the First and Second Appellants in somewhat more detail than appears on the face of the J15 and the annexure thereto:

> "… both accused 1 and accused 2[5] have been charged and are going to answer to the following charges in terms of the Sexual Offences and related matters amendment Act 32/2007[6]:
>
> 3.1 Section 8 – Compelling or causing persons 18 years or older to witness a sexual offence, sexual acts or self masturbation.
>
> 3.2 Section 9 – Exposure or display of or causing exposure or display of genital organs, anus or female breast to persons 18 years or older.
>
> 3.3 Section 10 – Exposure of or display or causing exposure or display of child pornography or pornography to persons 18 years or older.
>
> 3.4 Section 15 – Act of consensual sexual penetration with certain children (statutory rape).
>
> 3.5 Section 16 – Acts of consensual sexual violation with certain children (statutory sexual assault).

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[4] It is an accepted practice in bail applications to tender evidence by way of an affidavit. Such an affidavit will, however, obviously have less probative value than oral evidence which is subject to the test of cross examination (*S v Pienaar* 1992 (1) SACR 178 (W); *Moekazi and Others v Additional Magistrate, Welkom, and Another* 1990 (2) SACR 212 (O); *S v De Kock* 1995 (1) SACR 299 (T); *S v Hartslief* 2002 (1) SACR 7 (T) and *S v Maki en Andere* 1994 (2) SACR 630 (E).)

[5] This is a reference to the First and Second Appellant respectively.

[6] The correct citation is the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007. In this judgment I refer to it simply as the Sexual Offences Amendment Act.

3.6 Section 17 – Sexual exploitation of children.

3.7 Section 18 – Sexual grooming of children.

3.8 Section 19 – Exposure or display of or causing exposure or display of child pornography or pornography to children.

3.9 Section 21 – Compelling or causing children to witness sexual offences, sexual acts or self masturbation.

3.10 Section 22 – Exposure or display of or causing exposure or display of genital organs, anus or female breasts to children."

[15] From *Grobler's* affidavit, it appears that the investigation against the Appellants commenced after a 13 year old girl, who worked as a child prostitute in the Draaifontein area, Greenbushes, Port Elizabeth, was reported missing by her mother. The child was last seen alighting a white motorvehicle. Numerous prostitutes and street children from the area were interviewed. It was established that the occupants of the vehicle were well known to the street children as a married couple, "*Johan*" and "*Cornelia*"[7] who regularly collected street children from the area. The children were then taken to the couples' house where they were "*used for sexual purposes*", for which they were paid "*between R100,00 – R150,00*".

[16] Captain *Grobler* alleged that thirteen witnesses were traced and interviewed by himself and senior members of the Police Service. Statements were obtained from all of them concerning their relationship with the First and Second Appellants. From information gleaned from these witnesses he was of the view that numerous transgressions of the Sexual Offences Amendment Act had occurred and "*could still be occurring*". He was of the opinion that they were "*starting an*

[7] These are the names by which the First and Second Appellant appear to be commonly known.

investigation regarding an alleged case of pedophilia". At the time of deposing to his affidavit, 130 charges ("*10 charges per witness*") were to be preferred against the Appellants.

[17] According to the witnesses' sworn statements, the Appellants had been "*picking up*" children for a number of years. There was a preference for young girls (seemingly pre-pubescent) between the ages of ten and fifteen years. The girls - who *Grobler* himself refers to as "*prostitutes*" - willingly accompanied the Appellants as they were paid and plied with alcohol and food. At the Appellants' home they were shown pornographic movies; watched the couple engage in sexual acts with each other or third persons; and themselves engaged in oral sex or other sexual acts with one or other of the Appellants. The First Appellant also had sex with some of the witnesses, or attempted to penetrate them. One girl, aged 12, complained that the day after such an attempt, she hurt and her vagina burned. The First Appellant had two favourite "*minor girls*"[8] who regularly called at the couples' home and with whom, on occasion he had sex twice a day.

[18] The Second Appellant was allegedly complicit in these sexual acts. The witnesses alleged that she watched (sometimes with some of the minors) while the First Appellant had sex with them. On an occasion she had sex with a "*black male*" while the First Appellant and a minor girl watched. The couple apparently also used to pick up "*young boys*" for her pleasure, but this practice was stopped because the boys could not be trusted not to steal. According to one of the

[8] The ages of these two girls are not specified in Grobler's affidavit.

witnesses, the Second Appellant further told her what she should do in order to gratify the First Appellant.

[19] *Grobler* concluded from the witness statements that both Appellants "… *were possibly pedophiles and that the street children (*had) *been exploited sexually for a long time*". One of the witnesses, a 25 year old woman, indicated that she was first picked up by the couple ten years previously when she was only 15 years of age. Evidently this practice has continued over a period of ten years.

[20] The Appellants were arrested on 23 December 2009 on charges under the Sexual Offences Amendment Act after discussion with a senior prosecutor. A search warrant was also authorized, pursuant to which the police confiscated a computer and thirteen DVDs "*allegedly containing pornography*" at the First Appellant's son's home to which the former had directed the police. The inside of the Appellants' home was consistent with descriptions given by the witnesses, and items of clothing belonging to a small female person were also confiscated there.

[21] The Appellants were questioned regarding the allegations against them. They furnished certain information to the police, the most significant being the following[9]:

Second Appellant:

- She had a difficult childhood which included time in a children's home.

[9] This is extracted from *Grobler's* affidavit.

- She became involved in a three way sexual relationship with the First Appellant and her sister (the Third Appellant) when she was eleven years old and had had sex with the First Appellant from that age.
- She confirmed that the "*three way relationship*" was continuing.
- She had known the First Appellant all her life, was extremely loyal to him and loved him.
- She was aware of the First Appellant's "*obsession with minor children*" and accompanied him to pick up children for sexual purposes at their home.
- She was aware that the First Appellant had sex with the minor children. She never partook in the sex acts, however, although she "*observed*" the First Appellant having sex with them, "*… both oral and normal sex*". She claims to have waited in the other room most of the time.
- Pornography was shown to the children.
- She knew that what Johan did to the children was wrong[10].

<u>First Appellant</u>:

- He admitted that he used minor children "*for sexual purposes*".
- He had a "*problem*", but could control it. In the past he had lost control because the children "*flirt*" with him.
- He knows the children ages, because he asks them.
- He gives the children alcohol to drink.
- The children "*masturbate him*" and give him "*blow jobs*" (This would not happen, he says, if they were not "*like they are*").
- He denied having sex with them.
- He uses both a blue Uno and white Almera to pick up the children.
- He wanted to stop, "*had stopped*" and was "*definitely going to stop in the new year*".
- He knew that this conduct was wrong, but the children "*offer it*" and "*play with his mind*". He had said no, but they keep coming back.
- He has never forced any person, nor hurt them.

[10] It is difficult to distinguish the "*information*" from the often very subjective observations of *Grobler*.

- He has never "*raped*" anyone, or hurt them.
- With regard to the problem which he "*can control*", he can't do so if the children "*keep pulling him into it*".
- He needs "*help*".
- He denied that the Second Appellant ever partook in or observed the sexual acts, but she knew of his sexual obsession with children and that he had sex with them regularly[11].

[22] *Grobler* alleges that the Second Appellant was herself groomed by the First Appellant from an early age and was susceptible to his influence. His control over her was not only emotional, but also economic as he created the impression that should she leave, she would not be able to survive and have nowhere to go[12].

[23] *Grobler* concluded that bail should not be allowed for the Appellants for the following reasons:

"21.1 that the investigation is far from complete and that there is the possibility that the accused, if either should be released, will not only influence the witnesses already traced and whom are known to them but might cause future witnesses to become unavailable to the SAPS.

21.2 that the crimes are of a most serious nature and that if convicted both the accused can expect long prison sentences. They are both a flight risk as Johan has money available which he obtained when he was retrenched, especially, if the enormity of this investigation and the other possible linkages are taken into account.

21.3 Only the accused know what dark secrets are going to be exposed here and in Durban[13]. The possibility of suicide by one or both can not be ignored. They are in a hopeless situation and they clearly understand that their illegal actions for more than 10 years in which the lives of numerous under age children have been

[11] Some of these statements are clearly contradictory.

[12] It is not clear from *Grobler's* affidavit if the Second Appellant conveyed as much to him, or if this is his own conclusion.

[13] The Appellants lived in Durban prior to moving to Port Elizabeth.

destroyed, has now ended. They are aware that the SAPS will do it's utmost to trace and find all the victims of their perversion. Both these accused are in my humble opinion unstable and the weight of their illegal actions might be to hard to bear. It is my submission that they should not be afforded the opportunity to cheat justice by taking the easy way out.

21.4 the investigation into child pornography or pornography and a possible pedophile ring is on going and should the accused be released it could cause evidence and witnesses to be lost. The details of said investigation can unfortunately not be revealed because of the sensitivity there off.

21.4 The possible connection between the accused and child traffickers are being investigated. The details of said investigation can unfortunately not be revealed because of the sensitivity there off.

21.5 the crimes, which we intend to prove beyond a doubt, are viewed as very serious by the Community as is clearly illustrated in the media. The Community rightly expects the Justice cluster to take a stern view and to set an example in these matters (sic)."

[24] The First Appellant thereupon adduced oral testimony in which he outlined his personal circumstances. He is 53 years of age, and has been married to the Second Appellant for 26 years[14]. They have a son aged seven years. He has two older children aged 18 and 31 years, both born to the Third Appellant. The 18 year old child lives with him and the Second Appellant, and is supported by him. He was retrenched six months before the bail hearing from Spoornet with whom he enjoyed 36 years' of uninterrupted service. This was his first job after school. He has lived in Port Elizabeth for approximately 20 years and prior thereto resided in Durban for 17 years. Two years before his retrenchment already he commenced a private business plying his trade as an electrical motor rewinder, which enterprise he has continued to operate from home since his retrenchment. The business generates an average income of R1 000,00 per week. He received a substantial pension payout, most of which he has invested. He supports his family from the interest.

[14] The First and Second Appellants are married in community of property to each other.

[25] He does not have a passport neither has he ever before left the country.

[26] He and the Second Appellant live at, and own, the property at […] Road in A[…], Port Elizabeth. It is unencumbered and was acquired a few years ago. Before this the Appellants owned a property in Newton Park.

[27] He denied having any previous convictions but referred to two prior occasions on which he was arrested, but freed. One of the charges related to domestic violence, but this was withdrawn at court. He was also charged with drunk driving. This charge was ultimately thrown out, however, because the content of alcohol in his blood was below the legal limit. He paid bail in an amount of R200,00 in respect of the latter charge and met the conditions thereof. He has never given false information and co-operated with the law before.

[28] There are no pending cases against him.

[29] With regard to the charges preferred against him, he indicated that he would plead not guilty, but elected not to testify regarding the merits thereof. He denied being a pedophile or that he was complicit with child traffickers. He would deny any allegations of child trafficking if such charges were to come.

[30] He gave the usual undertakings not to jeopardize the bail system and to meet any conditions of bail. He was willing to do so despite the "*klomp klagtes teen (*hom)*"* and his awareness that, if convicted, he would face a long term of imprisonment. He would even accept if was required, for example, to remain under "*house arrest*" pending the finalization of the matter. He could afford bail in the sum of R5 000,00.

[31] Under cross examination he conceded that he may have been found guilty of an additional charge of the negligent loss of a firearm in respect of which a suspended sentence was imposed. Whilst being aware of the charge, he did not recall a conviction. He was under the impression that the case had been withdrawn against him because his weapon was stolen from him. It was also put to him that he had a previous conviction for reckless/negligent driving, but he clarified that this was the same matter previously referred to by him as the drunk driving case.

[32] A hint of how he would deal with the charges upon trial emerged when the question of his possible contact with state witnesses was explored. He stated that contact was initiated entirely by the children and was limited to offering them work to help his wife clean the house or be a playmate to his 7 year old son. He denied that he and the Second Appellant used them for sexual purposes. He also denied that their ages were between 10 and 15. He insisted that he would establish that children invited to his home would be at least 16 years old as he understood that this was the legal age for them to work. He denied ever having gone to fetch children as alleged. He and the Second Appellant were always friendly and kind to

the children and would give them food to eat. They discouraged such contact, however, after a bicycle and cell phones were stolen from their home.

[33] He acknowledged that he visited the Greenbushes area where it is alleged he picked up children, but this was strictly to meet up with a colleague who was doing motor re-winding work for him. He knows one person by the name of Joanna from this area with whom he and the Second Appellant are acquainted. She is 25 years old.

[34] It is not clear if this was due to an oversight on his part, but the First Appellant failed, in his evidence in chief, to pertinently refute any of the allegations in *Grobler's* affidavit particularly in relation to his alleged "*weakness*" for or obsession with pre-pubescent girls. He further failed to deny that he had furnished the relevant personal information contained therein. But for the broad and general denial elicited by the State during cross-examination, these averments in *Grobler's* affidavit may have stood uncontroverted.

[35] The Second Appellant did not testify herself, electing rather to hand in an affidavit in which she set out her personal circumstances. Leaving aside those factors which are common to both appellants, she is 44 years of age and is unemployed. She too has no passport and has never before left the country. Neither she nor the First Appellant have any connections outside of South Africa. She has no previous convictions, no outstanding cases and has never been arrested before.

[36] She denies ever having committed an offence. She states that the information furnished by her to the police - I assume that which is referred to in *Grobler's* affidavit - was extracted as a result of intimidation and under threat that her child would be permanently taken from her.

[37] She undertook to meet the usual bail conditions and indicated that she could afford to put up an amount of R5 000,00 in this regard.

[38] The Appellants thereupon closed their case. Closing submissions were made and the matter was postponed to 15 January 2010 for judgment.

[39] On the latter date the Third Appellant was added as an accused, having been arrested the day before. The State opposed bail for her and the matter was postponed for a formal bail application. The State also applied, on this date, to re-open its case on the basis of "*new*" information which had come to light. In this regard a further affidavit of Captain *Grobler* was admitted into evidence with the Appellants' consent, but without admitting the contents thereof. Principally its purpose, so it was explained by the prosecutor, was to demonstrate that whereas before there had been no allegations of violence against the Second Appellant, this was now a factor in the consideration of bail.

[40] According to *Grobler*, one of the witnesses claimed that the First Appellant had forcibly penetrated her when she was 13 years old. *Grobler* added that the number of victims stood at 17 with 10 charges per victim, the Appellants facing 40 additional charges in terms of the Sexual Offences Amendment Act.

[41] Mr *Roelofse* elected not to lead further evidence concerning the new allegations in *Grobler's* affidavit, but informally recorded the Appellants' denial thereof.

[42] On 21 January 2010 the State once again sought permission to re-open its case with a view to introducing further evidence, this ostensibly pertaining to the Second Appellant's attempt to evade trial or to undermine the proper functioning of the criminal justice system. Yet a further affidavit of *Grobler* was tendered into evidence. The gist of the last affidavit is that, following an interview with a witness at the prison where the First Appellant was being incarcerated, the First Appellant had plotted to commit suicide. The Third Appellant allegedly smuggled ten sleeping tablets and poisonous lice shampoo into the prison to enable him to achieve this end. He, in turn, had given her "*suicide letters*" and instructions to be opened once informed of his death. The letters which were placed in a safe at the First Appellant's home, were confiscated by the police. In *Grobler's* opinion, the letters - which were also introduced into evidence - were indeed "*suicide notes*".

[43] One of the letters instructed: "BEWAAR IN KLUIS TOT EK IETS OORKOM…" In it the First Appellant says twice : "outhou ek neem my lewe vir (jou/julle)". He also

writes, to the Second Appellant: "ONTHOU EK GAAN DOOD WEES JY KAN ENIGE IETS SÊ OM DAAR UIT TE KOM …"

[44] Arising from this evidence, the First Appellant was re-called to testify. He denied emphatically that he had any contemplation whatsoever to take his own life and explained that the shampoo was for lice treatment and the pills in order to enable him to sleep. The letters were intended to be instructions to the family in respect of how to manage his affairs upon his demise. He explained that prison was a dangerous place, prompting him to arrange his affairs against the contingency of his untimely death.

[45] After this evidence, the matter was postponed for the Third Appellant's bail application, which appears from the record to have been finalized on 26 January 2010[15]. Judgment in respect of the First and Second Appellants' bail application was withheld on the basis that the bail application for the Third Appellant should first be finalized. A single judgment was ultimately delivered.

[46] In giving his ruling, the magistrate approached the matter on the basis that the onus was on all three appellants to satisfy the court that exceptional circumstances existed which in the interests of justice permitted their release on

[15] There is no evidence which appears on the record in respect of the Third Appellant's bail application. I was assured at the hearing of the bail appeal, however, that no *viva voca* evidence was adduced by any of the parties and that it was unnecessary to reconstruct the record for this purpose. The parties were in agreement that I could dispose of the matter in the absence of such a transcript.

bail. He found that none of them had discharged this onus. In his judgment he focused predominantly on the First Appellant, dealing very obliquely with the position and roles of the Second and Third Appellants. In fact he appears to have simply assumed that whatever concerned the First Appellant, applied to them as well.

[47] Section 65(4) of the Criminal Procedure Act provides that a court hearing a bail appeal shall not set aside the decision against which the appeal is brought, unless it is satisfied that the decision was wrong, in which event it shall give the decision which in its opinion the lower court should have given.

[48] Adverting to the Appellants' main ground for the appeal, Mr *Daubermann*, who appeared on their behalf, contended that the charge sheet itself was decisive to determine whether the Appellants had been "*charged*", within the contemplation of section 60(11), with an offence referred to in Schedule 5 or 6 of the Criminal Procedure Act. It didn't matter, so he argued, what the investigating officer might come and say. The matter stood or fell by how the charge sheet presented. Even in respect of the further affidavit of *Grobler* which indicated that at least a *prima facie* charge of rape had been made out as against the First Appellant, the legal and factual position was that the Appellants had not been "*charged*" within the

meaning of section 60(11) of the Criminal Procedure Act. He referred me to the *dicta* in *S v Botha*[16], *S v Van Wyk*[17] and *Gada v S* in support of this submission[18].

[49] It is so that the charge sheet very tersely reflects the charges without reference even to the relevant legislation. Assuming, so Mr *Daubermann* argued, that this was not fatal in itself, since the implication was that such offences were created under the Sexual Offences Amendment Act, none of the charges alluded to by *Grobler* in his first affidavit are in any event listed in Schedule 5 or 6. (I return to deal with this aspect further below). The Second and Third Appellants had no previous convictions, which meant that the court was, therefore, required to approach their applications on the basis provided for in section 60(1)(a). In this regard the onus remained on the prosecution. As for the First Appellant, his position might be somewhat different because he had previous convictions. These were not proven by the State[19] to be of the nature referred to in Schedule 1, however, which might have elevated the matter to a Schedule 5 enquiry[20].

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[16] 2002 (1) SACR 222 (SCA) at 229, para 16.

[17] 2005(1) SACR 41 (SCA), para 3.

[18] 2007 (3) SA 43 NC at para 5.

[19] This submission was somewhat mischeviously made as the Criminal Procedure Act compels the accused in bail proceedings to inform the court whether he has "*previously been convicted of any offence*" under pain of prosecution and imprisonment for withholding it or furnishing it untruthfully. (*Section 60(11B)(a)(i)* and *(d)*). Such information must surely include details of the sentence imposed.

[20] Schedule 5 lists "(a)*n offence referred to in Schedule 1 – "(a) and the accused has previously been convicted of an offence referred to in Schedule 1, …*".

Schedule 1, in turn, lists "(a)*ny offence, except the offence of escaping from lawful custody …, the punishment whereof may be for a period of imprisonment exceeding six months without the option of a fine*". Leaving aside the question of the exact import of the sentences imposed pursuant to the First Appellant's prior convictions, none of the offences appear on the list in Schedule 1.

Accordingly, in respect of his application as well, the burden was on the State to prove that the interests of justice did not permit his release from detention.

[50] I am not in agreement with Mr *Daubermann* that the meaning of the concept "*charged*" calls for a narrow legal approach[21]. Neither do I believe that a bail court can simply ignore matter which goes beyond the formulation in the charge sheet. Indeed it would be absurd to elevate form above substance in this manner when clear evidence or common cause facts otherwise establish that the accused faces one of the more graver offences referred to in Schedules 5 or 6. To my mind this is further not the effect of the authorities relied upon by Mr *Daubermann*.

[51] The dictim in *S v Botha*[22] must be read in proper context. It was held in that matter that averments in charge sheets are sufficient without further ado to trigger the onus in section 60(11) - depending which one of the Schedules are applicable - without a need first to evaluate the facts. This observation was made by Vivier, AJA against a contention that the Legislature could not have intended that a mere allegation in a charge sheet was so sufficient. In my view *Botha*, *Van Wyk* and *Gade supra* are not authority for the proposition that the prosecution must stand or fall by the formulation in the charge sheet, or that evidence and common cause facts may not establish the jurisdictional fact[23].

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[21] In *Prokureur-Generaal, Vystaat v Ramakhosi* 1997 (1) SACR 127 (O) Edeling J held that the term "*charged*" has a narrow meaning, but in that matter offence was mentioned "*in passing*". It was clarified that the person in custody must be charged with a definite, circumscribed ("*omlynde*") and understandable offence. This was not the problem in the present matter.

[22] *Supra* at 229 d – e.

[23] *S v Van Wyk supra* merely repeated the *dictum* in *Botha*.

[52] *Du Toit*[24] suggests that section 60(11) was probably enacted on account of decisions like *S v Shezi*[25] and *S v Stanfield*[26] to make it easier for the prosecution to establish the objective jurisdictional facts which must exist before subsection (a) or (b) can come into operation. In the former the State handed in a charge sheet in a bail application which did not state the charges in respect of which the accused was arrested and upon which it required his continued confinement. Although it is generally unacceptable that a deficient charge sheet be relied upon, it was held that where it is common cause that the accused was arrested on a charge referred to in Schedules 5 or 6 of the Criminal Procedure Act, the onus was on him to satisfy the court that the interests of justice do not require his confinement. The jurisdictional fact could be established with reference to common cause facts, admissions or by way of evidence. I quote from the judgment:

> "Waar die Staat derhalwe staatmaak op die bepaling van artikel 60(11), soos gewysig, moet daar by wyse van 'n volledige klagstaat waarin die volle besonderhede van die misdryf uitgespel word, dit wil sê dit moet duidelik wees dat die beskuldigde aangekla word van 'n misdryf soos bedoel in artikel 60(11)(a), soos gewysig, anders moet daar feite voor die hof geplaas word of as gemeensaak óf by wyse van 'n erkenning óf deur middle van getuieness waaruit dit duidelik aangetoon word dat artikel 60(11), soos gewysig, van toepassing is op daardie betrokke beskuldigde."

[53] In *S v Stanfield* it was held that paltry allegations in the charge sheet could be supplemented with reference to the statements in the docket.

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[24] Commentary on the Criminal Procedure Act at 9 – 48B.

[25] 1996 (1) SACR 715(T).

[26] 1997 (1) SACR 221 (C).

[54] In the absence of a written confirmation envisaged in section 60(11), evidence may establish the jurisdictional facts[27]. Conversely, written confirmation is not required where the jurisdictional fact is not an issue[28].

[55] The objective, it seems, is for the accused to know once the jurisdictional fact moves the burden from the prosecution to him and to my mind, for as long as he is left in no doubt as to the nature of the charges he is facing and is given a "*reasonable opportunity*" to meet the burden put on him in section 60(11)(a) or (b) as the case may be, a deficient charge sheet is of lesser significance[29]. When he knows the charge he is facing, he suffers no prejudice as a result of a skeletal or *pro forma* charge sheet and there is nothing inhibiting him from showing exceptional circumstances (assuming Schedule 6 to be of application), or acquitting himself of the reverse onus that the interests of justice permit his release (if Schedule 5 applies)[30]. In this instance the Appellants at all times stood poised to meet the burden provided for in section 60(11) - albeit there was uncertainty about which of the two sub-sections applied. They could, therefore, not have been prejudiced. It could hardly have been argued that the charges to be preferred against them were not understood or clearly outlined. On the contrary, it does not appear that they were in any way surprised by the case which the State intended to present.

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[27] *S v Kock* 2003 (2) SACR 5 (SCA) where it was assumed, by the end of the bail application in the magistrate's court, that the State had done enough to establish the jurisdictional fact. (At 9 g).

[28] *Jacobs & Others v S* [2004] 4 All SA 538 (T) at [5].

[29] *Frost v State* [1997] JOL 1591 (E), *Joseph v S* [2001] 3 All SA 448 (C), *Sarang v S* [2003] JOL 11547 (T)

[30] *S v Mohammed* 1999 (2) SACR 507 (C) at 513e.

[56] I accordingly reject the argument that I am bound to determine this appeal on the basis that the limited detail set forth in the charge sheet is decisive of the matter insofar as the onus is concerned.

[57] I turn now to a consideration of whether the magistrate was correct in ruling that Schedule 6 was applicable. I will confine my concern in this regard to the First and Second Appellants only as there was no evidence whatsoever that the Third Appellant was complicit with them in the commission of any of the offences.

[58] In my view it was not out of place for the magistrate to consider at the outset, and before proceeding with the hearing of the application, which of the two schedules was applicable[31].

[59] Although the evidence of Captain *Grobler* had not at that stage served before the magistrate, the arguments which were made before him bear on his ruling. I quote in this regard from the record:

> "MNR ROELOFSE : … in beide dra die Verdediging die bewyslas, dit is net die graad die swaarte van die bewyslas wat verskil …
>
> HOF : (Nie in mikrofoon).
>
> AANKLAER : Edelagbare die Staat se submissie is dat (tussenbeide).
>
> HOF : (nie in mikrofoon). Skedule 5 misdryf?
>
> MR ROELOFSE : Skedule 5.

[31] There are several judgments which confirm that the magistrate should not adopt a supine approach in bail applications, but rather a pro-active one.

HOF : (Nie in mikrofoon).

AANKLAER : … dit is a Skedule 6 Edelagbare om hulle minderjarig is onder die ouderdom van sestien dan Edelagbare. Die toestemming kan dan nie wetlik gegee raak nie en dan sal die Staat dit verder in die hande van die hof laat, Edelagbare.

HOF **:** (Nie in mikrofoon).

AANKLAER : onder sestien jaar, Edelagbare, die Staat se submissie is dat dit wel statutêre verkragting is, dat dit wel onder Skedule 6 sal val. In die geval alhoewel dit kan wees dat van die persone dan toestemming sou gee, sou dit nie wetlik wees nie omdat hulle dan onder ouderdom was, Edelagbare. Dit is die Staat se submissie dat dit ‘n Skedule 6 is en laat dit in die hande van die hof, Edelagbare.

MNR ROELOFSE : As ek mag repliseer Edelagbare. Dit is juis my problem, my probleem dat statutêre verkragting en verkragting net nie dieselfde ding is nie. Verkragting ontbreek toestemming in die geheel. Die wetgewer maak nie onderskeid van kan ‘n person toestemming gee of ‘n persoon nie toestemming gee nie. Daar is net eenvouding nie toestemming gegee nie. Statutêre verkragting wat ‘n aparte misdryf is, is juis geskep deur die wetgewer waar ‘n minderjarige wat nie kan toestemming gee nie, wel toestemming gee en dit is juis hoekom daardie klagte geskep is. Dit word nie in so ‘n ernstige lig gesien deur die wetgewer as verkragting nie en dit is hoekom die vonnise ook van so aard is as wat opgelê word.

HOF : Hoe oud is die persone?

MNR ROELOFSE : Hulle is (tussen beide).

AANKLAER : Edelagbare tussen die ouderdomme van 10 en 15.

MNR ROELOFSE : 10 en 15 jaar.

AANKLAER : van 10 tot 15. Daar is meer as een slagoffer in die saak, Edelagbare. Op hierdie stadium is daar 13 slagoffers, Edelagbare.

MR ROELOFSE : Die punt is net Edelagbare, selfs waar daar ‘n minderjarige betrokke is, as daar ‘n klagtestaat opgestel word en daar was nie toestemming nie, dan sou die klagtestaat lees verkragting, die feit van die klagte word uiteengesit en die persoon sal nie vir statutêre verkragting aangekla word nie, of dan in die alternatief soos hulle gedoen, vir statutêre verkragting aangekla juis omdat dit nie dieselfde misdruif is nie, dit is hoekom ek sê die wetgewer sal onderskeid getref het in die stelling van die Skedule 6 klagtes, dit is ‘n verkragting en statutêre verkragting want dit is nie dieselfde misdryf nie. ...”

[60] While I am in agreement with the argument that “*rape*” and “*statutory rape*” are different offences, to my mind the position is different where the victim is

under the age of 12 years. The Sexual Offences Amendment Act makes clear provision for this.

[61] The offence of rape referred to in Schedule 6 is listed as follows:

> "Rape … as contemplated in section 3 … of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, … –
>
> (a) ….
>
> (b) Where the victim –
>
> (i) is a person under the age of 16 years;"[32]

[62] It is notable that the offence singled out in Schedule 6 is not simply "*rape*", but rape as contemplated in the relevant sections of the Sexual Offences Amendment Act. One accordingly has to read in what is contemplated by section 3 (or 4 as the case may be).

[63] The Sexual Offences Amendment Act consolidates all crimes relating to sexual matters. It repeals the common-law crime of rape and replaces it with an expanded statutory crime of rape, which is applicable to all forms of sexual penetration without consent, irrespective of the gender of the perpetrator or the victim. It repeals the common law crime of indecent assault and replaces it with

[32] I quote only the relevant portion thereof. The offence of compelled rape is not relevant for our present purposes.

the statutory crime of sexual assault, applicable to all forms of sexual violation without consent. It also creates comprehensive new crimes relating to sexual acts against children.

[64] Section 3 of the Sexual Offences Amendment Act provides that any person who unlawfully and intentionally commits an act of sexual penetration with any person without the latter's consent, is guilty of the offence of rape.

[65] Section 3 must, in turn be read with section 1(3), which contains an important provision qualifying the element of consent. Section 1(2) provides that "(f)*or the purposes of section 3* (inter alia) *"consent" means voluntary or uncoerced agreement*".

[66] Section 1(3) reads as follows:

> "3. Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), (6) and (7) of any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a) and 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:
>
> (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
>
> (i) The use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C, or D; or
>
> (ii) A threat of harm by A against B, C or D or against the property of B, C or D;

(b) where there is an abuse of power or authority by A to the extent that B is inhibited form indicating his or her unwillingness or resistance to the sexual act, or unwillingness to particulate in such a sexual act;

(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that-

(i) B is committing such a sexual act with a particular person who is in fact a different person; or

(ii) such a sexual act is something other than that act or

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act -

(i) asleep;

(ii) unconscious;

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgment is adversely affected;

(iv) a child below the age of 12 years; or

(v) a person who is mentally disabled."

[67] Subsection (iv) of subsection (3)(d) is relevant for our purposes : If, at the time of the common of the sexual penetration the complainant is a child under the age of 12 years, any ostensible "*consent*" by him or her is in law invalid. Such a child is incapable of consenting to a sexual act, whether penetration, or any of the range of offences referred to in subsection (2) or (3) for that matter. This is provided for in section 57 of the Sexual Offences Amendment Act.

[68] It is indeed so that the Legislature has distinguished in the Act between offences of rape and consensual penetration ("*statutory rape*"), on the other hand, and sexual violation and consensual sexual violation ("*statutory sexual assault*") on the other, where the rape or assault respectively was consensual, in much the

same way as applied in the common law, but with an important distinction in respect of children under the age of 12.

[69] Section 15 creates the offence of statutory rape as follows:

> "(1) a person (A) who commits an act of sexual penetration with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

[70] Section 16(1), in turn, creates the offence of statutory sexual assault as follows:

> "(1) a person (A) who commits an act of sexual violation with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child."

[71] The latter provisions need be read with the definition in section 1 of the word "*child*", which means:

> "(a) a person under the age of 18 years; or
>
> (b) with reference to sections 15 and 16, a person 12 years or older, but under the age of 16 years, …"

[72] In my view it is clear that the "*child*" referred to in sections 15 and 16 is older than 12, but younger than 16 years. Below the age of 12, the child's consent is invalid.

[73] It is notable that the offences of statutory rape and sexual assault respectively are not listed in sections 1 (2) or (3) where the element of consent is clarified. In my view this is so because sections 15 and 16 create separate statutory offences for consensual sexual acts (penetration and sexual violation respectively) with a child older than 12, but younger than 16. These offences (contraventions of sections 15 and 16 respectively) do not resort under Schedule 6, but rather Schedule 1, inasmuch as they amount to "*sexual offence(s) against a child … as contemplated in part 2 of Chapter 3*" of the Sexual Offences Amendment Act.

[74] In my view, therefore, where children are under the age of 12 years - because their consent is in law invalid - sexual acts with them would either constitute rape as contemplated in section 3 (a Schedule 6 offence) where it involves sexual penetration, or sexual assault as contemplated in section 5 (A Schedule 5 offence) where it involves a "*sexual violation"* as defined in the Act. Presumably in practice the charge sheet will have to qualify an absence of consent in terms of section 1(3)(d)(iv), but clearly the Legislature intended to criminalize consensual sexual acts with a child under 12 years as either rape or sexual assault as the case may be. In my view the common law distinction between rape and statutory rape as it applied before in respect of children under 12 years has been overtaken by the statutory omnibus for all sexual offences which creates a special dispensation for sexual offences against such children.

[75] Before concluding in this regard, and with reference to the Second Appellant's role in the offences, section 55 of the Sexual Offences Amendment

Act creates a separate offence of "*Attempt, conspiracy or incitement inducing another person to commit sexual offence*". The section provides as follows:

> "Any person who –
>
> (a) attempts;
> (b) conspires with any other person;
> (c) aids, abets, induces, incites, instigates, instructs, commands, counsels, or procures another person,
>
> to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[76] This section criminalizes all anticipatory conduct (attempt, conspiracy and incitement) in respect of sexual crimes as well as all conduct by accomplices to the commission of such crimes. Since it creates a separate offence, any attempt, conspiracy, incitement or conduct as an accomplice would in my view not resort under the offence "*rape*" referred to in Schedule 6, or sexual assault referred to in Schedule 5.

[77] In respect of the First Appellant – who it is implied must have been the main perpetrator - I am satisfied that the magistrate correctly found (even just on the common cause facts which were argued before him at the commencement of the bail application) that he was facing Schedule 6 offences, where penetration was an element, and Schedule 5 offences in respect of the charges relating to sexual assault, in respect of such of the girls as were under the age of 12 years at the time of the commission of these offences.

[78] Even if I am wrong in finding that the offence of rape referred to in Schedule 6 includes consensual penetration with children below the age of 12 years, by 15 January 2010 the evidence adduced by the State in any event established a *prima facie* charge of rape as contemplated in section 3 of the Sexual Offences Amendment Act as against the First Appellant which would have been sufficient to trigger the onus referred to in section 60(11)(a) of the Criminal Procedure Act.

[79] The position of the Second Appellant is less clear. It could not have been evident to the magistrate, before *Grobler's* affidavit was admitted into evidence, what the extent of her involvement was. The focus during argument was on acts of consensual sexual penetration which she could not have perpetrated. I find, in the result, that the magistrate erred in ruling that she faced a Schedule 6 offence which triggered the onus referred to in section 60(11)(a).

[80] But even after evidence was adduced, there was still no basis to deal with the matter as if there were an onus on the Second Appellant to satisfy the court that exceptional circumstances existed which in the interests of justice permitted her release. The State conceded during argument that the offences which she faced did not resort under either Schedule 5 or 6. The provisions of section 60(1)(a) of the Criminal Procedure Act were, therefore, applicable to her. In this regard too, the magistrate misdirected himself.

[81] I turn now to consider afresh whether bail was correctly refused in respect of the Second Appellant. I am not persuaded that the evidence convincingly established the existence of any of the likelihoods referred to in section 60(4) concerning her. The onus would have been on the prosecution to establish these grounds, on a balance of probabilities. Even accepting a strong *prima facie* case against her relating to certain of the charges, I am inclined to agree with Mr *Daubermann* - at least in respect of her - that the grounds advanced by *Grobler* for opposing bail were largely speculation. The concerns which were raised with regard to the First Appellant cannot *per se* be extended to her. The magistrate ought to have dealt with each of the Appellants' applications on their own merit. His failure to do so proved to be prejudicial to her, and to the Third Appellant as well.

[82] The Second Appellant's circumstances are favourable to the granting of bail and her evidence in this regard was not in any way contradicted by the State except to comment generally on the various possibilities that she may not stand trial. It is trite, however, that there has to be a likelihood, i.e. a probability that the risks referred to in section 60(4) will materialize[33]. A possibility or suspicion will not suffice. While one is tempted to simply dismiss *Grobler's* concerns on the basis of the semantic use by him of the word "*possibility*" in stating the grounds for his objections to bail, the court is yet constrained to look beyond the terminology employed in the affidavit to ascertain if the State has convincingly established the likelihood that the Second Appellant's release will, *inter alia*, impact upon the integrity of the investigation and presentation of the case, or that she may flee. To

[33] *S v Dlamini*; *S v Dladla and Others*, *S v Joubert* and *S v Schietekat* 1999 (2) SACR 51(CC); *S v Mabena and Other* 2007 (1) SACR 482 (SAC) at 79 F.

my mind the answer is not. No basis for disallowing bail can be found in the evidence and even less so in *Grobler's* speculative arguments concerning her. The limited concern that she may be influenced by the First Appellant, which might result in her attempting to influence the witnesses, can easily be addressed by setting appropriate conditions on bail, which is what I intend to do.

[83] With regard to the Second Appellant, I accordingly find that the State has not proved that the interests of justice militate against her entitlement to be released on bail.

[84] The final issue which I need address is whether the First Appellant, on the evidence, discharged the onus resting on him in the bail application. Section 60(11)(a) of the Criminal Procedure Act obliges the court in the case of Schedule 6 offences to order that an accused be detained in custody until dealt with in accordance with the law, unless he advances evidence to satisfy the court that exceptional circumstances exist which in the interest of justice permit his release on bail.

[85] Graver offences, such as those listed in Schedules 5 and 6, are subject to a more stringent regime. Whilst an arrested person is generally entitled to be released on bail if a court is satisfied that the interest of justice so permit, the reverse applies where a person has been charged with offences listed in the schedules. The reversal of the general rule was held by the Constitutional Court in

Dlamini[34] to limit the constitutional right to bail, but the relevant provision, i.e. section 60(11)(a), survived a declaration of invalidity because the limitation was held to be "*reasonable and justifiable*" in terms of section 36 of the Constitution in our current circumstances[35].

[86] Exceptional circumstances do not mean that "*they must be circumstances above and beyond, and generally different from those enumerated in subsection 60(4) – (9) In fact, ordinary circumstances present to an exceptional degree may lead to a finding that release on bail is justified."*[36]

[87] What the First Appellant appears to have done in presenting his case is simply to have gone through the grounds referred to in section 60(4) on a check-list basis. Further, other than to indicate that he would plead not guilty, his focus was not directed on the strength of the State's case against him. He also failed to address *Grobler's* allegations against him concerning his admission that he used minor children for sexual purposes, had a sexual obsession with them and needed help to control himself against the temptation to succumb to their invitations. Given the fact that we are dealing with a sordid practice which has persisted for a lengthy period, the First Appellant's inability to control himself and having regard to the vulnerability and availability of the young girls, there is to my mind a real likelihood that the First Appellant, if released on bail, would commit one or other

[34] *S v Dlamini supra* at 485 D.

[35] At page 90 a - b.

[36] *S v Dlamini supra* at page 89 e, *S v Botha supra* at par [19]; *Rudolph v S* [2009] JOL 24336 (SCA) at par [9].

of the sexual offences referred to in Schedule 1. The unchallenged evidence in this regard establishes a disposition on his part, evident from past conduct.

[88] With reference to the ground referred to in section 60(4)(b), the likelihood is very real too, when regard is had to the First Appellant's familiarity with the young girls and his historical relationship with them that, if released on bail, he would attempt to influence witnesses. As the State contended before the bail court, their poor circumstances, lack of parental involvement and need for money makes them particularly vulnerable ("*kwesbaar*") and thus open to be influenced. Because of this, bail conditions prohibiting communication between the First Appellant and the witnesses would be ineffective and difficult to enforce.

[89] A further matter of relevance is the evidence against the First Appellant that he conspired to commit suicide. While there is little to stop an accused from pursing such a desire if he really was inclined to take his own life, (and I make no finding that even an expressed desire necessarily constitutes a reason on its own to refuse bail) of greater concern is his exhortation to the Second Appellant : "*Jy weet niks. Onthou ek gaan dood wees. Jy kan enige iets sê om daar uit tekom*". In my view this shows the extent to which he would go to undermine the criminal justice system. His desire to influence his wife is patently evident in the communication to her. Although he sought to put a different spin on the import of the notes which were confiscated by the police, I believe that he failed to convincingly explain what he meant by this particular statement to the Second Appellant. He dealt with it as follows:

> "… Ja, wel dit is so, as ek nie daar is nie kan ek niks weet nie, maar dit is nie waaroor dit gaan nie, ek glo sy is onskulding. Kyk as jy luister na van die leuens wat ek gelees het hier, sal enigiets gedoen word om haar skuldig te probeer kry en dit gaan onregverdig wees, dit gaan heeltemaal onregverdig om haar skuldig te kry op enigiets, want ek glo nie sy is skuldig."

[90] If the Second Appellant is innocent of the charges, it is not clear on what basis she would be assisted by saying "*anything*" to exonerate herself. The distinct impression is that the First Appellant wishes to direct how she should deal with the charges even upon his death so as to obfuscate a successful prosecution against her.

[91] I do not agree that the evidence properly established the likelihood or probability that the First Appellant was a flight risk (despite the strength of the State's case), but when all the relevant matter is weighed[37], the grounds which on the evidence have been established (section 60(4)(a), (c) and (d)), do not tip the scale in favour of granting bail to him.

[92] The First Appellant has accordingly failed to acquit himself of the onus resting on him to prove that exceptional circumstance exist which in the interests of justice permit his release. In the result his release on bail is not permitted and bail to him is refused.

[93] I make the following order:

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[37] In terms of section 60(9) of the Criminal Procedure Act.

1. The appeal in respect of the First Appellant is dismissed.

2. The appeal in respect of the Second Appellant is upheld and the order of the magistrate refusing to admit her to bail is set aside.

3. It is ordered that the Second Appellant be released on payment of bail in the sum of R5 000,00, subject to compliance by her with the conditions set forth in paragraphs 4 and 5 of this order.

4. The Second Appellant is prohibited from having any contact whatsoever with any of the state witnesses pending the criminal proceedings.

5. The Second Appellant is required to appear in court on the dates and at the times and places to which the criminal proceedings may from time to time be adjourned, and to remain present until her case has been dealt with or finalized by the court.

6. The Respondent is requested to furnish the Second Appellant, within five (5) days, with a list of all the state witnesses who she is prohibited from having contact with.

B C HARTLE

ACTING JUDGE OF THE HIGH COURT

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