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

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A150/2022

In the Appeal between:

MILTON SIBIYA Appellant

and

THE STATE Respondent

HEARD ON: 04 NOVEMBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 30 November 2022.

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[1] The appellant is a pastor (prophet) of the church known as Redeeming Embassy. He was arrested on 9 December 2021 for the rape of a fifteen (15)

year old child in contravention of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("*The CLAA*").

[2] At all material times hereto the complainant was a member of the appellant's church. It is the State's case that the appellant raped the complainant from April 2016 to July 2021 at the church, under the guise of providing her with counselling. The rapes started when the complainant was nine years old, the last incident took place at the complainant's home outside the backroom.

[3] On 22 December 2021 the appellant launched an application to be released on bail in the magistrates' court for the district of Lejweleputswa. Magistrate van Rensburg dismissed the application on 12 January 2022 on the grounds that the appellant failed to prove any exceptional circumstances justifying his release on bail. His subsequent bail on new facts suffered the same fate two months later on 24 March 2022.

[4] In the court *a quo,* it was common cause that the offence which the appellant is charged with falls within the offences listed under schedule 6 of the Criminal Procedure Act[1] (the "CPA") and that given its nature, the appellant was not entitled to be released from custody pending trial, unless he adduced evidence which proves on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his release on bail.[2]

[5] The appellant is aggrieved by the magistrate's refusal to admit him to bail. He appeals to this court by virtue of section 65(1)(a) of the CPA which provides that:

> *"An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the*

[1] Act 51 of 1977.

[2] Section 60 (11) (a) of the CPA.

imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting."

[6] The principles applicable in appeals where the decision by a lower court to admit an accused to bail is attacked, are now established. In terms of section 65 (4) of the CPA:

> "*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."*

[7] The onus is on the appellant to persuade this court that the magistrate's decision to refuse bail was wrong. In *S v Barber*[3] it was pointed out by Hefer, J that:

> *"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. 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 review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it should be in 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 but exercised that discretion wrongly."*

[8] In the grounds of appeal, the appellant attacks the magistrate's decisions for refusing both the initial bail and the bail on new facts. At the hearing of this appeal the appellant abandoned the appeal against the dismissal of the initial bail application, the appeal proceeded against the refusal of the appellant's renewed bail on new facts.

[9] The new facts upon which the bail on new facts was predicated were essentially that there is a likelihood that the appellant will be acquitted at the

[3] **1979 (4) SA 218**D at 220 E–H.

trial as the State's case against him is weak and this fact, taken cumulatively with his personal circumstances constitutes exceptional circumstances which in the interests of justice permit his release on bail pending trial.

[10] In the court *a* quo, the appellant testified in support of his bail application and also called six witnesses who are also members of his church namely, Relebohile Patana (referred to as "Refilwe"), Nthabiseng Carol Mokoena (Nthabiseng), Ivy Mosenyehi Mokoena, Nthabiseng Gladys Masenkane and Poppy Thito. The witnesses confirmed the appellant's assertion that the complaint's allegations are false.

[11] Relebohile, Nthabiseng and Ivy even went further to state that investigating officer had approached them enquiring whether they were also raped or sexually assaulted by the appellant and when they denied the allegations the investigating officer was sceptical and promised to protect them if they disclosed what the appellant did to them. Nthabiseng is also the complainant's former best, she told the court that the complainant had in fact told her that she (the complainant) was going to open a rape case against the appellant and that certain people will approach her (Nthabiseng) regarding the complainant's allegations and she must not only confirm them but also tell those people that the appellant had also raped and sexually assaulted her.

[12] The court *a quo* was implored to grant bail as the appellant's incarceration was not only detrimental to his family but to the church and the community at large. It was explained to the court that the appellant is the sole breadwinner, his wife was pregnant, unwell, unemployed and on the verge of being evicted from their rented home due to unpaid rent. Prior to his arrest, the appellant was also providing spiritual and financial assistance to the church members and the community, he was their "beacon of hope."

[13] It was thus submitted that the cumulative effect of these circumstances rendered them “exceptional” for the purpose of justifying the appellant’s release on bail.

[14] On the other side constable Molete, the investigating officer in this matter testified in opposition of bail arguing that the appellant was not a candidate for pre-trial release on bail. Her view was based on the fact that the evidence implicating the applicant is overwhelming therefore there is a likelihood that if he is released on bail he will evade trial. She told the court that the appellant is also likely to interfere with the State witnesses as he has already threatened a State witness. He has the propensity to commit similar offences because at the time of the bail application he was out on bail in relation to another rape charge involving a congregant of his church. There were also two additional sexual offences cases reported against him and more victims were coming forward.

[15] In this appeal, the argument advanced on behalf of the appellant in support of his contention that magistrate’s decision was wrong is that: the magistrate considered the appellant’s personal circumstances on a piece-meal basis instead of taking them cumulatively with the weakness of the State’s case to conclude that they do not constitute exceptional circumstances. The magistrate also overlooked the evidence of a conspiracy to falsely implicate the appellant.

[16] It is further submitted that the magistrate was biased against the appellant, he conducted the bail hearing as a trial and made a determination on the appellant’s guilt. His remark that “*there is enough evidence before the court at this stage, in terms of section 64(a)* (sic) *to make a finding that if the applicant is going to be released on bail, it is a real, and I repeat, a real likelihood that he will indeed proceed with his sexual conduct against women and childr*en” proves that he has already concluded that the appellant committed these offences.

[17] It is the appellant's case that there was evidence that the investigating officer went about recruiting victims to open cases against the appellant and also coerced witnesses to change their statements to align them with the complainant's statement but the magistrate praised her instead of reprimanding her for the manner in which she conducted the investigation.

[18] The magistrate is also criticized for failing to take into account that the addition of further charges will delay the matter.

[19] On the contrary, the State persisted with the argument that the appellant failed to discharge the onus of proving that exceptional reasons are present to warrant his release on bail, the appeal ought to be dismissed.

[20] In the record of the proceedings it is clear that the learned magistrate had duly considered the appellant's personal circumstances and the strength of the State's case. In his ruling he took into account that the appellant's criticism of the veracity of the State's case was merely premised on the assertion that the allegations of the complainant pertaining to the rape have been gainsaid by the appellant's witnesses therefore she is not trustworthy and concluded that this argument is flawed as the credibility of the complainant can only be judged at the trial. The magistrate consequently concluded that on the available evidence *prima facie*, the State has a strong case against the appellant and the appellant's personal circumstances on their own, do not constitute exceptional circumstances to justify his release on bail.

[21] I am unable to find that the magistrate was wrong in his conclusions in this regard. It is trite that the weakness of the State's case can be construed as "exceptional circumstances" as provided for in section 60 (11) (a) of the CPA justifying the appellant's release on bail pending trial. The onus is on the appellant to adduce evidence which proves on a preponderance of probabilities that he will probably be acquitted at the trial.[4]

[4] *S v Mathebula* **2010 (1) SACR 55** (SCA) at 59 para 12.

[22] The fact that the defence and the State's evidence is mutually destructive does not necessarily entail that the State's case is tenuous with the result that the State will be unable to prove the appellant's guilt. The assessment of the credibility of all witnesses, the reliability of their evidence as well as the probabilities accorded to such testimony is the task of the trial court.[5] A bail enquiry is not the forum where the credibility of witnesses is evaluated. All that has to be determined is the *prima facie* guilt "to the extent that it may bear on where the interests of justice lie in regard to bail."[6] I am not disregarding the probability that the appellant may be falsely implicated but that issue as well can only be judged when the State's case has been put to the test. On this basis, it cannot be said that the appellant had discharged his onus of proving that he was likely to be acquitted at the trial.

[23] Taking into consideration the strength of the State's case, the appellant's personal circumstances had to be weighed against the interests of justice which require the appellant to stand his trial and not interfere with the state witnesses.

[24] In this matter, the magistrate's findings alluding to the presence of the circumstances contemplated in section 60(4)(a) to (c) of the CPA[7] are indisputable namely that:

24.1. there was a likelihood that if released on bail the appellant will commit schedule 1 offences because at the time of the bail application he was on bail for another rape charge perpetrated under similar circumstances and there were at least two further sexual assault cases registered against the appellant which speaks to his propensity to commit similar crimes;

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[5] See *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* **2003 (1) SA 11** (SCA).

[6] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* **1999 (2) SACR 51** (CC) para 11.

[7] Page 202 to 204 of the record of the proceedings.

24.2. the probability of being sentenced to life imprisonment if convicted could influence the appellant to evade trial; and

24.3. based on his alleged prior conduct of threatening a witness, he may interfere with the state witnesses.

[25] The interests of justice do not permit the release of an accused on bail where the above-mentioned factors prevail. The appellant's personal circumstances are outweighed by possibility that he might evade trial or intimidate the witnesses.

[26] I now turn to the further issues raised by the appellant. There is no merit to the appellant's contention that the magistrate conducted the bail hearing as a trial. In the record of the proceedings, from page 56 onwards it is clear that it was the appellant through his legal representative who delved into the merits of the case prompting the State to object and the magistrate to question the relevance of that evidence.

[27] Similarly, the allegation of bias levelled against the magistrate for his finding that if the appellant is released on bail he "would proceed with his sexual conduct…" is unwarranted. Section 60 (5) (e) of the Act enjoins the court to take into account evidence of an accused's disposition to commit a schedule 1 offence including previously committed related offences when considering whether the interests of justice would not be undermined if an accused is released on bail.

[28] There was nothing untoward about the conduct of the investigating officer. The appellant deliberately ignores the fact the testimony of his witnesses merely revealed that the investigating officer offered them protection in the event they feared to disclose if they were raped or sexually assaulted. I cannot find any evidence of clandestine investigative methods which would have warranted the magistrate's censure.

[29] It is indisputable that all the charges laid against the applicant have since been consolidated, the probability of the trial being delayed is minimal.

[30] Having regard to the facts of this matter, I am not persuaded that the magistrate exercised his discretion wrongly in refusing the appellant's bail. There is thus no basis to overturn the decision of the magistrate, the appeal must accordingly fail.

ORDER

[31] In the premises, I make the following order:

1. The appeal against refusal of bail is dismissed.

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NS DANISO, J

On behalf of appellant:	Mr Matee
Instructed by:	Matee Attorneys
	BLOEMFONTEIN

On behalf of respondent:	Adv. Hoffman
Instructed by:	Director: Public Prosecutions
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