REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A28/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

23/05/2023 _____

HABIB ADAM Appellant

and

THE STATE Respondent

Neutral Citation: *Habib Adam v The State* (Case No. A28/2023) [2023] ZAGPJHC 549 (23 MAY 2023)

JUDGMENT: BAIL APPEAL

Johnson AJ

[1] This is an appeal against the refusal of the regional court to grant bail. The public prosecutor informed the court at the start of the proceedings that the appellant is charged with contraventions of section 19(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in that he possessed child pornography, and of section 20 of procuring a child for the creation of child pornography, and that Schedule 5 was applicable. The defence did not object to the prosecutor's setting out of the charges that the appellant faced. The prosecutor and Mr Sadiki for the appellant agreed that he is charged with an offence mentioned in schedule 5 of the Criminal Procedure Act (CPA).

[2] Mr Sadiki alleged that he was initially informed that this would be a bail application that resorted under schedule 6 of the CPA, but that he would nevertheless proceed as if this was in fact a schedule 5 offence, and that he had prepared an affidavit. There was therefore no confusion as to what the appropriate schedule would be. The prosecutor then asked the court to determine what schedule it should be, but the question was left unanswered. It is unknown why the court was asked to determine this, as the parties had already agreed that it was a schedule 5 matter.

[3] Mr Sadiki did not request clarity or a postponement because of confusion. He proceeded on the basis that the appellant faced a schedule 5 offence.

[4] The appellant declared in his affidavit Exhibit "A", that he has passports from Great Britain and Northern Ireland. The police had visited his address in Birmingham, which is his fixed address. He has made alternative accommodation arrangements in South Africa until this case is finalized. He will work from home and earn a living in South Africa. He has no pending cases or warrants against him. During his relationship with the complainant, she was 16 years old. He met her and her family on numerous

occasions. He has never had sexual encounters with the complainant. The state's case against him is weak and nothing links him to the crime.

[5] Samuael Mashego who is a police officer, declared that he was requested to accommodate his cousin's neighbour's son during his trial on charges relating to a minor child. He was hesitant as he has a minor child who visits him on occasions, but as he could arrange for the child not to visit him during the appellant's stay, he agreed to accommodate him. The appellant's father's unsworn email was handed in to confirm the accommodation arrangements.

[6] Captain Veronica Bank deposed of an affidavit wherein she declared that she is the investigating officer. The appellant is charged with contraventions of section 19(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 relating to child pornography, including other sexual offences. He sexually exploited the complainant, a minor child, online into self-masturbation as well as watching him masturbate. He groomed her into believing that he was 16 years old and that he loved her. An online filter prevented her from seeing his face, which she saw for the first time in March 2022 during his first visit to South Africa. During his arrest on drug charges, he was questioned about the image of the 14-year-old complainant on his phone, which he said was his sister.

[7] During online conversations with the complainant, he frequently attempted to convince her to run away from home with him. He is financially capably of travelling to and from South Africa as he wishes and to secure expensive hotel accommodation. When he was prevented from seeing the complainant, he uttered online threats. He has threatened to harm the complainant's family because he thought that they had ill-treated

him. He had images in his possession which depicted absolute depravity. Some of the material contained images of very young children being raped.

[8] Captain Banks also testified under oath that she has 30 years' experience with the Family Violence, Child Protection and Sexual Offences Unit. The complainant's phone was downloaded and apparently contained all the incriminating evidence that links the appellant to the crimes. She is still in the process of gathering evidence. She believes that the appellant's intention was to lure the complainant away from home, take her across the border to the UK with the intention to human traffic her.

[9] Section 60 (11) of the CPA determines as follows:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-
>
> (b) in Schedule 5, ….., 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."

[10] Section 50 (4) of the CPA determines as follows:

> "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; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system.

(d) any other factor which in the opinion of the court should be taken into account.

(5)……..

"(6) In considering whether the grounds in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4) (*c*) has been established, the court may, where applicable, take into account the following factors, namely—

(*h*) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;

(b) whether the accused is in custody on another charge or whether the accused is on parole;

(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions."

[11] In her judgement, the learned magistrate focused on the provisions of section 6 to determine whether it would be in the interest of justice to release the appellant on bail. She determined that the State has a *prima facie* case against the appellant, and that the *viva voce* evidence of Capt. Banks, which sets out how the appellant was linked to the crimes, weighed heavier that the appellant's affidavit. He failed to disclose a pending drug charge; he knows the witnesses and could influence or intimidate them, like he did according to Capt. Banks, before his arrest. I might mention at this stage that the evidence relating to the threats is not contradicted. The learned magistrate further found that, if he is released on bail, nothing would prevent him from contacting the complainant. The court subsequently denied bail.

[12] Bail appeals are governed by section 65(4) of the CPA which states 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."*

[13] The powers of courts of appeal are limited where the matter comes before it on appeal and not as a substantive application for bail. The court must be persuaded that the magistrate exercised his or her discretion wrongly.

[14] In *S v Barber 1979 (4) 218 (D)* at 220E-H the court said the following: *"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 the bail exercised that discretion wrongly"

[15] The appellant is aggrieved by the fact that the charge sheet makes no mention of schedule 5, but the argument ignores the fact that it was admitted at the outset that schedule 5 is applicable.

[16] As far as the address that was mentioned that would be his permanent address pending finalization of the trial, it can be described as nothing else than an address of convenience to secure bail. Nothing binds him to that address and he and Mashego are strangers to each other. The fact that he mentions an address in South Africa where he had in fact never stayed before, is no guarantee that he will stand trial. It is not his property, and he does not own anything in it.

[17] The magistrate warned the appellant from the outset that he had to disclose any pending matters. He however misled the court and falsely declared that there were no pending cases against him. Besides the pending drug charges, there is also a pending charge which is being investigated against him in the United Kingdom, which he concealed in his affidavit.

[18] It was further alleged that the learned magistrate misdirected herself by finding that she cannot ignore the drug charges against the appellant. That allegation is incorrect. In terms of section (7)(h) the magistrate, when considering whether the release of the appellant is in the interest of justice, may take into account any other factor which in the opinion of the court should be taken into account.

[19] I am not convinced that the magistrate was wrong in refusing bail. The appellant has not adduced evidence which proved that the interests of justice permit his or her release on bail.

[20] I consequently issue the following order:

The appeal is dismissed.

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P Johnson
Acting Judge of the High Court

FOR APPELLANT:	ADV. R.F. ONOVO, 421 SCHREINER CHAMBERS, PRICHARD STREET, JOHANNESBURG
FOR RESPONDENT:	ADV. C. RYAN, OFFICE OF DIRECTOR OF PUBLIC PROSECUTION
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