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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

_____ ____
DATE SIGNATURE

CASE NUMBER: A153/2022

In the matter between:

M, M A APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an appeal against the refusal by the Regional Magistrate at Johannesburg to grant bail to the appellant pending his trial.

[2] The appellant is charged with the following offences:

(a) Count 1 is a contravention of the provisions of s3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60, and 61 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007 ('Act 32 of 2007'), further read with sections 92(2), 94, 256, 257, 261, 270 of the Criminal Procedure Act 51 of 1977 ("Act 51 of 1977'), further read with section 120 of the Children's Act 38 of 2005 ('Act 38 of 2005'), further read with section 51(1) and part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'). (Rape of a 9-year-old child (Minor Child)).

(b) Alternative to Count 1 is a contravention of the provisions of s1 of Act 1 of 1988 read with section 51(1) of Act 105 of 1997.

(c) Count 2 is a charge of sexual assault

(d) Count 3 is a contravention of the provisions of s19 read with ss1, 2,50, 56A, 57,58, 59, 60, 61 of Act 32 of 2007 and further read with the Film and Public Publications Act 65 of 1996, further read with ss94, 256 and 270 of Act 51 of 1977 further read with s120 of Act 38 of 2005.

[3] The appellant proceeded with his bail application by way of affidavit. The Court *a quo* denied the appellant bail on 26 September 2022.

[4] The appellant was legally represented during the bail application proceedings.

[5] Condonation is granted for the late filing of the appeal.

[6] In the appellant's notice setting out his grounds of appeal, the appellant contends the following:

'A. THE INTERESTS OF THE STATE AND SOCIETY

1. The Learned Regional Court Magistrate:

1.1. failed to take into account that the Appellant could neither constitute a risk to society nor endanger the safety of other persons, this as the alleged offence, if any were to be proven – which is denied - related solely to a domestic incident between the Appellant and one of his three minor children ("the Minor Child"), this as opposed to the Appellant committing an offence against an arbitrary third party in society.

1.2. overlooked the fact that:

1.2.1. neither the State; 1.2.2. nor the Complainant; 1.2.3. nor the SAPS; 1.2.4. nor any third party, opposed the formal Application for the Appellant's release on Bail.

1.3. erred in overlooking the State Prosecutor's initial volunteering to have the Appellant released upon payment of R3000 Bail, and although the State did perform an about turn, this at the remand of the Matter from Booysens Court Number 1 to the Johannesburg Regional Court No.13 (for Formal Bail Proceedings), it did not oppose the granting of Bail at the subsequent Hearing of the Formal Bail Application.

1.4. erred in accepting the mere unconvincing *ipse dixit* of the State presented through the stand-in Investigating Officer, one Sergeant Mashaba, whom, incidentally, was not present at any stage during and/or throughout the Hearing of the Bail Application, as to why the matter had not been brought to court in three years.

1.5. erred in accepting the mere *ipse dixit* of the State Prosecutor, that the State had a *prima facie* case against the Appellant, which flies in the face of enacted Section 35 (3) (h) of the Constitution of the Republic of South Africa Act, Act No. 108 of 1996, as amended, and without derogating therefrom, more particularly, the presumption of innocence of the Appellant.

1.6. erred in disregarding the Appellant's invitation to surrender his passport, declining to procure any travel documents and report to the SAPS nearest police station as further bail conditions, this until the conclusion of the Trial.

1.7. erred in not considering that Bail being granted to the Appellant not only served the interests of justice, alternatively, constituted exceptional circumstances, but also, served the liberty interests of the Appellant, and more importantly, that it would serve the public interest, this by, inter alia, reducing the:

1.7.1. high number of Awaiting Trial Prisoners being held in an existing overcrowded Correctional Detention System;

1.7.2. number of minor children that are concomitantly deprived of the love, support and financial assistance of a bread winning parent.

1.8. erred and failed to take into account or take any cognisance of the Honourable Minister of Justice's efforts in recognising the severe impact of overcrowding in the Prisons and the increasing spread of the Covid - 19 Pandemic in the Correctional Services System, this by putting in place procedures that facilitated the release of certain categories of Awaiting Trial Prisoners in order to alleviate congestion in the Prisons.

1.9. erred in not considering the probable very lengthy duration of incarceration of the Appellant, this until the finalisation of the Trial, which has been enrolled for 22 to 24 March 2023, but realistically, and having simultaneous regard to the lengthy and protracted delays in that respect, could well be towards the end of 2023.

B. THE ALLEGED OFFENCE/S

The Learned Regional Court Magistrate:

1.10. failed to have any, alternatively sufficient regard to the triad of the cautionary rules of evidence, more particularly, that the evidence, if a Trial were to eventuate, would be presented by the State in terms of the evidence:

1.10.1. of a single witness;

1.10.2. of a minor child;

1.10.3. relative to an alleged sexual offence/s.

1.11.

1.11.1 erred in not taking sufficient cognisance of the fact that the State failed to comply with Section 266 of the National Prosecuting Act, Act No. 32 of 1998, as amended, this in that it failed to attach a Certificate or Code, regarding Schedule 5 or Schedule 6 of the Criminal Procedure Act, Act No. 51 of 1977, as recently amended ("the CPA"), and thereby failed in its duty as an officer of the Court.

1.11.2. To that end, the State's uncertainty as to the date/s upon which the alleged contraventions occurred simply served to characterise the weakness of the State's case which, in turn, should have availed the Appellant of the benefit of such doubt.

1.12.

1.12.1 erred in accepting the lacunae in the State's Case, more particularly, the absence, in the J.88 Medical Report, of any reference to injuries, or penetration or any rupture, fissure or scarring (which would be) indicative of an assault on the anatomy of the Minor Child; and accordingly,

1.12.2 misdirected herself in concluding that there was medical evidence that penetration had occurred (line 14, typed page 9 transcript of 26 September 2022), this in circumstances where there was no such evidential material before the Court of First Instance.

1.13. erred in not having regard to the absence of any DNA evidence implicating the Appellant in the commission of any offence.

1.14. failed to have sufficient regard to the SAPS Docket referring to a Sexual Assault Investigation since 2019, that had suddenly, sans any merit, rationale or justification whatsoever, morphed into a rape allegation.

1.15. erred in failing to have regard to the fact that the State was not in a position to dispute the grounds enumerated in Section 60 (4) of the CPA, which favoured the Appellant, and without derogating therefrom, that the Investigating Officer's Affidavit:

1.15.1. was not properly attested in compliance with the legal tenets;

1.15.2. infracted against the law of evidence, this in that it contained solely hearsay evidence.

1.16. erred and misdirected herself in finding that the Appellant had not discharged the onus as contemplated in Section 60 (11) (b) of the CPA, this pre-supposing that the Honourable Court of Appeal is satisfied that the State has established whether the alleged offence, at the time of the Bail Application, constituted a Schedule 5 or Schedule 6 listed offence – which is denied.

1.17 erred in concluding that the offence, to be put to the Appellant, resorted under Schedule 6 of the CPA (line 15, typed page 8 transcript of 26 September 2022), the worst scenario being Schedule 5 (which is, in any event, denied) and which would have eased the criteria and burden of proof resting on the Appellant, resulting in the probabilities of the Appellant being granted Bail that much more probable.

C. THE ACCUSED'S PERSONAL CIRCUMSTANCES

The Learned Regional Magistrate:

1.18. erred in not taking into account or sufficiently and adequately considering that the Appellant was entitled to be presumed innocent until proven guilty.

1.19. erred in overlooking the common law requirement and natural want of the Appellant, as the biological father of three minor children, whilst incarcerated, would be deprived of seeing his three minor children.

1.20. erred in:

1.20.1. finding that the Appellant is currently addicted to drugs – which is not the case - and based whereupon, she determined that, if granted Bail, the Appellant would, whilst in the presence of the minor children, constitute a risk to them, and accordingly, should remain incarcerated on that basis alone, and simultaneously,

1.20.2. failing to take into account the supporting, and more significantly, uncontested evidence that the Appellant was no longer addicted to drugs.

1.21. failed to consider, at all, that the Appellant's remaining two younger minor children would be deprived of contact with the Appellant whilst he remained incarcerated, more particularly having regard to the fact that children, especially minor children, need regular and ongoing contact with the father (whom, in this instance, ought to have been presumed innocent until proven guilty).

1.22. erred in failing to accept the uncontested evidence that:

1.22.1. the Appellant had never had a Domestic Violence Protection Order issued against him;

1.22.2. no Protection Against Sexual Harassment Order had been issued against the Appellant,

this despite, significantly, SAPS' 'investigation' enduring for the protracted period commencing 2019 until 2022.

1.23. failed to have sufficient or any regard to the uncontroverted evidence that the Appellant, effective from the divorce many years ago, lived apart from his Divorced Wife and their three minor children.

1.24. overlooked the fact that the Appellant had volunteered to have buccal tests and fingerprints taken on 12 September 2022, this in response to a disguised invitation by the SAPS to have "the paperwork done", and which, to compound matters (to the prejudice of the Appellant), the SAPS converted into a deficient identity parade with the subsequent arrest of the Appellant that thereinafter followed. Moreover, the Appellant's voluntary and non–belligerent assistance was likewise overlooked.

1.25. erred in ignoring the transparency of the Appellant – which likewise did the State and SAPS - disclosing the prior intermittent drug addiction, and moreover, the State and SAPS' failure to contest the evidence that he had been rehabilitated.

1.26. overlooked the fact that the Appellant had no previous convictions placed before the court *a quo*.

1.27. erred in disregarding the Appellant's evidence that being detained prior to receipt of either the Docket or the Charge Sheet, the Appellant's resultant detention would constitute a severe and irreversible form of anticipatory (and unjustifiable) punishment.

1.28. erred in not, at the very least, addressing the salient issue of whether the Appellant constituted a flight risk, given that he had not been arrested in South Africa at any point in his life.

1.29. erred in having no regard to the evidence of the Mother of the Appellant, this in respect of the whereabouts and the concomitant improbability of the Appellant having committed any offence under her Roof.

1.30. failed to have adequate or any regard to the fact that the alleged victim had been permitted, by her own (biological) Mother, to visit and stay overnight with the Appellant, this at various ongoing intervals during the three years commencing 2019 to 2022 – significantly, as is self-evident, subsequent to the date of the alleged offence/s.

1.31. erred in ignoring the affection displayed by the Minor Child, this in embracing the Appellant and other members of the Appellant's Family, during the Arrest Process, and as is self-evident, subsequent to the occurrence of the alleged offence.

1.32. erred in not having any regard to the uncontested evidence, of the Appellant, that his further incarceration would hamper and prejudice the Appellant in these respects: -

1.32.1. proper preparations for interacting and consulting freely and professionally with his legal representatives and any defence witnesses;

1.32.2. continued daily rehabilitation programme;

1.32.3. minor children focussing on their school tuition and examinations;

1.32.4. interaction with his own Family;

1.32.5. relationship with his two other minor children;

1.32.6. Mother, Father, Sister and Brother continuing their bond and relationship with the minor grandchildren; and

1.33. erred in her erroneous reliance upon the fact that the Complainant was the Child's Biological Mother (line 22, typed page 29 transcript of 19 September 2022), whereas, as a fact, the Complainant is the Minor Child's Stepfather, one M S.'

[7] The respondent's counsel contended that the Court *a quo* dealt fully with these aspects and as a result, the respondent supports the refusal to admit the appellant to bail. The respondent contends that the appellant failed to discharge the onus resting upon him that exceptional circumstances exist and failed to show that the judgment of the Court *a quo* was wrong as required by section 65(4) of Act 51 of 1977.

LEGAL PRINCIPLES

[8] Count one falls within the category of offences listed in schedule 6 of Act 51 of 1977. Rape as defined in schedule 6 includes:

'(b) where the victim-

(i) is a person under the age of 16 years'

[9] Section 60(11)(a) of Act 51 of 1977 states:

'Notwithstanding any provision of the Act, 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, give evidence which satisfy the Court that exceptional circumstances of justice, pawning him or her release on bail.'

[10] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed* [1], it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed* [2], it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. So the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[11] In the matter of *S v Mazibuko and Another* [3], the court held that for the circumstance to qualify as sufficiently exceptional to justify the appellant's release on bail, it must be one which weighs exceptionally heavily in favour of the appellant, thereby rendering the case for release on bail exceptionally strong or compelling.

[12] In the matter of *S v Kock* [4] the Supreme Court of Appeal stated that:

'In the context of s 60(11)(a) of the Act the strength of the State case has been held to be relevant to the existence of 'exceptional circumstances': *S v Botha en 'n Ander* 2002(1) SACR 222 (SCA) at para [21], *S v Viljoen* 2002(2) SACR 550 (SCA) at para [11]. There is no doubt that the strength (or weakness) must be given similar consideration in determining where the interests of justice lie for the purpose of s 60(11)(b). When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a *prima facie* view as to its strength or weakness the accused must receive the benefit of the doubt.'[5]

[13] In the matter of *S v Mathebula* [6] the Supreme Court of Appeal held that:

---

[1] *S v Mohammed* 1999 (2) SACR 507 (C)
[2] *Mohammed* (note 1 above)
[3] *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP)
[4] *S v Kock* 2003 1 All SAA 551 (SCA)
[5] *Kock* (note 4 above) para 15
[6] *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12

'…In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge…'[7]

[14] In the matter of *S v Smith and Another* [8] the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'.[9]

[15] In *S v Bruintjies* [10] the Supreme Court of Appeal stated that:

'(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel.' [11]

[16] In *Mathebula,* [12] the Supreme Court of Appeal stated that:

'In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive'.[13]

[17] In terms of section 65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

EVALUATION

[18] The affidavit that was read out and handed in during the bail application by the appellant's legal representative consisted of 27 pages setting out 79 points why the appellant should have been released on bail. Some of the factors set out below are duplicated in the notice of appeal, however for purposes of completion this Court will refer to them. They are:

(a) That he is a South African citizen, born in South Africa on […] May [...] and has been residing at […] Bantam Road, […], Johannesburg for many years and that it is his permanent home.

(b) That there is no certificate furnished by the State as to whether he would be charged with committing and perpetrating a schedule 5 or schedule 6 listed offence.

(b) That he was arrested three years after the alleged offence.

---

[7] *Mathebula* (note 6 above) para 12
[8] *S v Smith and Another* 1969 (4) SA 175 (N)
[9] Ibid at 177 e-f
[10] *S v Bruintjies* 2003 (2) SACR 575 (SCA)
[11] *Bruintjies* (note 10 above) para 7
[12] *Mathebula* (note 6 above)
[13] *Mathebula* (note 6 above) page 59 B-C

(d) That he voluntarily handed himself over to the Booysens Police Station on Monday the 12th September 2022.

(e) That he attended a sham identification parade where he was the only adult male of Indian extraction and wearing a galibeya / jiba traditional Islamic gown, sandals and Muslim headgear.

(f) That he subjected himself voluntarily to the taking of buccal samples and photographs.

(g) That on his arrival at the Booysens Regional Court at around 10h00 the State had no objection to him being released on bail of R3 000,00.

(h) That he denies all the allegations and will be pleading not guilty.

(i) That the cautionary rule will apply in that the offence relates to the evidence of a single Witness, who is a minor and who will be testifying in respect to an alleged sexual offence.

(j) That the mother of the complainant is influenced by her current husband in pressing these untruths, falsehoods and horrible allegations against him and that the appellant is the victim of a personal vendetta, given that the mother of the complainant is his ex-wife and where their divorce is an acrimonious one.

(k) That he has a good relationship with the complainant. That the complainant's mother, allowed his daughters to overnight with him and their grandmother, (who is his mother), for several years after the alleged events are supposed to have occurred.

(l) That currently he is working as a business broker involved in the motor vehicle industry.

(m) That he conducted overseas business visits during the course of which he could easily have evaded the course of justice.

(n) That upon his returning early from a business trip to Mauritius on Sunday, 4 September 2022, 'the investigation' appeared to gain momentum, despite him being permitted to see his children, that very Sunday night.

(o) That after spending several months at the Magaliesburg Health Centre, he has joined as a member and co-presenter at the Narcotics Anonymous Organisation.

(p) That he has not partaken in any drugs since January 2022.

(q) That his family and friends reside in South Africa and he owns movable assets such as household furniture and effects, a motor vehicle and jewellery.

(r) That he has never been convicted of any criminal offence either in South Africa or elsewhere.

(s) That the State in not furnishing him with the differing facts or dates when the alleged offences occurred, creates difficulty for him to refute such allegations.

(t) That the victim is not an arbitrary person that he robbed and attacked, it is his dearly beloved daughter and that he has no intention to interfere with her.

(u) That he is willing to hand in his passport.

(v) That his continued incarceration will prevent him from preparing and interacting freely with his legal representatives. It will prevent him from continuing his daily rehabilitation programme.

(w) That should he be released on bail, his release will not compromise the safety of the State, nor disturb the public order, nor undermine the proper functioning of the criminal justice system.

(x) That he is willing to report regularly to the South African Police Services

(y) That the delay in bringing the matter to Court has not in any way been of his doing.

[19] As regards the appellant's contention that the State failed to provide a certificate to the effect that it was charging the appellant with an offence referred to in schedule 5 or 6, this cannot serve as a reasonable ground of appeal. Section 60 (11A) (a) of Act 51 of 1977 states that:

'If the attorney-general intends charging any person with an offence referred to in Schedule 5 or 6 the attorney-general may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6' [my emphasis]

[20] Section 60(11A) (a) of Act 51 of 1977 stipulates that the Attorney-General 'may' issue written confirmation, not 'must' issue written confirmation. As a result, the Court *a quo* correctly stated that it is not required that a certificate be supplied to prove that this is a schedule 6 offence.

[21] The Court requested that in terms of s60(3) of Act 51 of 1977, the mother of the appellant, (who is also the paternal grandmother of the complainant), testify as a witness in the bail application. The witnesses' name is F D M ('Ms M'). There was no request to lead any evidence from the appellant after this witness testified.

[22] Ms M testified that after this incident occurred, the appellant went to Namibia to live with his father. This was from December 2019 up to the middle of January 2020 whereafter the appellant's father kicked him out, due to his drug addiction. From January 2020 up to March 2020 this witness had no idea where the appellant was, as he was out on the streets. The appellant then went for rehabilitation at Eikenhof farm from March 2020 to November 2020. After being released from rehabilitation, the appellant came to live with his mother until January 2022. From January 2022 to June 2022 the appellant was once again admitted for rehabilitation in Magaliesberg. The appellant left for Mauritius in July 2022 and returned on 4 September

2022. The appellant then handed himself over to the police on 12 September 2022. This witness stated that if the appellant is released on bail he will live with her at […] Bantam Road, […]. She stated that she will ensure that the complainant will not come to her house while the appellant is there and that the complainant lives 30 kilometres from where her house is situated. She heard on 14 December 2019 from the complainant's stepfather that this criminal case had been opened against the appellant. At this stage, the appellant had already left for Namibia. She also went to Namibia in December 2019 and informed the appellant that a case had been opened against him. She agreed that when the appellant came back to South Africa in March 2020 he did not hand himself over to the police, however she placed this blame on the complainant's mother and step-father as she had asked them for the details of the investigating officer, but they did not come back to her. Since November 2020 and September 2022 the appellant was living with her.

[23] This Court finds the evidence of Ms M somewhat disturbing in that she knew who the investigating officer was as her own statement was taken down on 3 February 2020, therefore it is unclear why she was waiting for the complainant's mother or step-father to give her the details of the investigating officer. Her evidence was furthermore unconvincing that she would in any way be able to control the appellant should bail be set. It is clear the appellant left in December 2019 to go to Namibia and even though Ms M informed her son that a case was opened against him, he was unpersuaded to return to South Africa in December 2019 to hand himself over to the police. During the period from January 2020 to March 2020 Ms M had no clue where the appellant was. This further accentuates her inability to control the appellant's whereabouts. This inability to control the appellant is further heightened by her inability to explain to this Court why she did not take the appellant to the Braamfontein police station during the period of November 2020 to July 2022 when the appellant was in South Africa and before his departure for Mauritius. She was unable to convince the appellant to hand himself over to the police after he was released from rehabilitation in June 2022. There is no clear indication why she never alerted the police that the appellant was in the country when she was fully aware that the police were looking for him.

[24] As regards the appellant's contact with the complainant, there are different versions presented before the Court. As per the affidavit of the appellant, it appears he had a lot of physical contact with the complainant after this case was opened, yet according to the appellant's mother the appellant only had contact via video call between 2019 and 4 September 2022. The only physical contact was on the appellant's return from Mauritius on 4 September 2022 when he took gifts to his three children. As a result, the appellant's version of his having

physical contact with the complainant and that nothing was done to withhold access of the complainant to either himself or his mother is not true. This is further heightened by the evidence of the appellant's mother who stated that the complainant's step-father even sought to obtain a restraining order against the appellant from seeing the complainant. This disputes the version of the appellant that no protection order was sought against him.

[25] The appellant did not present *viva voce* evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of *Bruintjies* [14] and *Mathebula,*[15] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen them. In fact, it appears that the appellant's affidavit is a mere repetition of s60(4) of Act 51 of 1977. As stated in *Mathebula* [16], parroting the grounds referred to in s60 (4) – (9) of Act 51 of 1977 does not establish any ground to be released on bail. As a result, the State could not cross-examine the appellant to test the veracity of the averments in his affidavit. It is respectfully submitted that this affects the weight to be attached to the averments made in the affidavit as the probative value of the affidavit could not be tested. In addition, the appellant did not explain why it is alleged the mother of the complainant influenced the complainant to open this case and neither did he explain why he has no friends or family outside the borders of South Africa when it is clear his father lives in Namibia and that he also spent a considerable time in Mauritius between July to September 2022. The most important factor that remains unclear to this Court is where did he live during the period from January 2020 to March 2020 when his own mother had no contact with him.

[26] The State was criticised in failing to arrest the appellant for three years after this incident happened as the docket was opened in November 2019. It is clear from the evidence of the appellant's mother that the reason why the appellant was not arrested sooner is because he failed to hand himself over to the police. The police had tried to trace him but in vain.

[27] The defence referred this Court to three unreported decisions of the Gauteng Local Division, namely, *Munyai Elson Ndwakhahulu v The State*[17] , *Nicholas Mankale Ramaroka v The State* [18] and *Gumbo Fanuel versus The State* [19], where on appeal the appellants were released on bail. In all three matters the appellants were charged with raping a minor child.

---

[14] *Bruintjies* (note 10 above)
[15] *Mathebula* (note 10 above)
[16] *Mathebula* (note 10 above) para 15
[17] *Munyai Elson Ndwakhahulu v The State* (case number A77/2022) (dated 10 August 2022)
[18] *Nicholas Mankale Ramaroka v The State* (case number A68/2021) (dated 24 March 2021)
[19] *Gumbo Fanuel versus The State* (case number A130/2017) (dated 12 May 2017)

[28] The facts of the matter *in casu* differ materially from the facts of the matter of *Ndwakhahulu*,[20] in that the appellant in that matter was already convicted and leave to appeal his conviction had been granted. In addition, the appellant in that matter had appeared 16 times in court whilst out on bail and never absconded. The appellant was also much older, he was 57years old and had no passport. The facts in that matter also showed that the appeal on the merits was arguable and not manifestly doomed to fail. The complainant in that matter was also twenty-one years old when she testified and due to her being sexually active when the medical examination was held, there was no conclusive medical evidence. The Court was accordingly convinced that there were grounds to satisfy the Court that he would not abscond. In the matter *in casu*, although the appellant was aware that the police were looking for him, he himself took a long time to hand himself in. In addition, the complainant in this matter was nine years-old when the offence happened and is ready to testify against the appellant on 22 March 2023.

[29] The facts of the matter *in casu* differ materially from the facts in the matter of *Ramaroka* [21], in that the appellant had no passport, he had never been outside the borders of South Africa, he also had no relatives outside South Africa and had fixed employment. The complainant's mother in that matter also had no objection that the appellant could be released from custody. In the matter *in casu,* the appellant has a father living in Namibia and has left South Africa previously. In addition, he does not have fixed employment, it appears as if he is working for himself as a broker.

[30] The facts of the matter *in casu* differ materially from the facts of the matter of *Gumbo* [22]*,* in that there was no direct evidence implicating the appellant. There was only circumstantial evidence. The family of the complainant merely assumed that because the child was in the company of the appellant that he had caused the injuries noted on the medical J88 report. In addition, the Court did not find that the appellant was a flight risk. In the matter *in casu*, the complainant has identified the appellant as being the one who forced her to hold his private part and who on the following night pulled down her trousers and inserted his private part into her 'bums'.

[31] The respondent presented the following evidence in the form of statements, namely, an affidavit prepared by the investigating officer ('Sergeant Mashaba'), a statement from the complainant, a statement from Ms M and a statement from the social worker ('Ms Khoza').

[20] *Ndwakhahulu* (note 16 above)
[21] *Ramaroka* (note 17 above)
[22] *Gumbo* (note 18 above)

[32] It is somewhat puzzling that neither the investigating officer nor the State prosecutor opposed the bail application. Irrespective of this, s60(10) of the Criminal Procedure Act 51 of 1977 stipulates that, 'Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'

[33] After a perusal of the record of the court *a quo*, this Court finds that there is no persuasive argument to release the appellant on bail. This Court's reasons are as follows:

(a) The complainant was nine-years-old when she made her statement. Even though her statement is not dated, she states with clarity that the appellant made her touch his private part, made her watch a pornographic video and she felt him putting his private part in her 'bums'. She also felt her panty was wet and she saw a yellow and white substance on her panty after the appellant had inserted his private part into her 'bums'. The State Advocate stated that as per the investigation diary, the statement of the complainant was obtained on 27 November 2019, which is the same date when the statement was obtained from the complainant's step-father, namely, M E S. A supplementary affidavit was obtained from the current investigating officer, namely Detective Sergeant Maphoto, as the previous investigating officer, namely, Sergeant Ndobe is on maternity leave. It appears that there is no statement from the complainant's mother. This is a factor that the court *a quo* took into consideration and in the judgment stated '…it seems that even the mother of this child does not have the best interests of this child at heart'.[23]

(b) The statement of the complainant is corroborated by the statement of her grandmother, namely Ms M, her step-father and the social worker Ms Khoza, who all state that the complainant told them that the appellant made her touch his private part and made her watch a pornographic video and that the appellant pulled down her trouser and that she felt his penis coming from her back. They all state that after the appellant had pulled down her trouser the complainant felt wet on her panties and found a white yellow discharge. There is also corroboration for the complainant's version that the appellant was sniffing white powder.

[34] In the course of a bail application the Magistrate need not make a finding as to the guilt or innocence of the accused. All the Court has to do is to weigh the *prima facie* strength or weakness of the State's case.

[35] The facts before the Court *a quo* were as follows:

(a) The statement of the complainant is clear and there is corroboratory reports made to Ms

[23] Transcript pages 89 line25 and page 90 line 1-2

M, the complainant's step-father and the social worker. There is no evidence to suggest that this complainant had a motive to falsely implicate her biological father,

(b) The medical evidence (J88) *prima facie* shows that the redness to the orifice of the anus supports that an object penetrated it.

[36] This Court cannot find that the Court *a quo* misdirected itself in finding that 'the State's case against the accused is either non-existent or subject to serious doubt'.[24] Even though the doctor indicated on the medical J88 report, that there are 'No physical injuries' [25] and that there are 'No obvious injuries on clinical examination' [26], these findings are contradictory to the conclusion in respect to the anal examination where the doctor noted redness at the 6 and 12 o' clock position and that the 'Skin around orifice appear red'.[27] There is no evidence that this child was constipated. As a result, it is most likely that an object caused this reddening. It is not for this court to speculate as to what caused this reddening, that is for the trial court to determine after hearing the medical evidence. However, from the anal observations by the doctor, it supports the version of the complainant that something was inserted into her anus.

[37] Even if this Court is wrong, the issue of the appellant being a potential flight risk is of more concern. From the supplementary statement of Detective sergeant Maphoto, it appears that the previous investigating officer, namely Sergeant Ndobe tried to trace the appellant at his mother's address but he was not around. It is the complainant's step-father who advised Sergeant Ndobe that the appellant had returned, however, she was informed that the appellant had booked himself into a rehabilitation centre. For the reasons stated in paragraph [23] this Court is unconvinced that Ms M will be able to control the appellant.

[38] The charge of rape of a minor child is serious and a term of life imprisonment shall be imposed unless substantial and compelling circumstances are present. In addition, there is an outcry in the community in respect to gender based violence crimes. The fact that the appellant states this matter is in respect to his daughter does not lessen the crime. A nine-year-old child cannot protect herself against the advances of an adult man. In addition, according to the complainant's version, she was told by the appellant not to mention anything that had happened.

---

[24] Transcript page 87 line 3-5
[25] J88 medical report page 1 paragraph 8
[26] J88 medical report page 2 paragraph 3
[27] J88 medical report page 3 paragraph 22

[39] The strength of a case against an accused and the nature and gravity of punishment which is likely to be imposed are some of the grounds which, in terms of s 60(6) of the Act, a court should consider in determining whether there is a likelihood of an appellant evading trial. In South Africa domestic disputes are rife and our country is engulfed with gender based violence. Such actions of the appellant need to be carefully considered before releasing him on bail.

[40] Due to the fact that the main consideration for the court in applications of this nature is the increased risk of the appellant absconding, such risk was not emphasised by the respondent in the Court *a quo*. This is extremely strange to this Court in light of all the time that the appellant was in South Africa but never handed himself over to the police.

[41] This Court believes that the appellant has not adduced evidence to support that there are exceptional circumstances to release him on bail. The trial is to commence on 22 March 2023 and it appears as it has been set down for three consecutive days. As a result, it does not appear that any unnecessary delays are envisaged to delay the finalisation of this matter.

[42] Accordingly, this Court finds that the appellant has not successfully discharged the onus as contemplated in section 60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail.

[43] Accordingly, there are no grounds to satisfy this Court that the decision of the court *a quo* was wrong.

ORDER

[44] In the result, the appellant's appeal is dismissed.

D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 February 2023.

Date of hearing: 30 January and 3 February 2023

Date of Judgment:	7 February 2023

Appearances:

On behalf of the appellant	Adv Ascar
Instructed by:	Ellis Coll Attorneys
On behalf of the respondent	Adv V. Sinthumule