

SOUTH AFRICA / JUDGMENT

Mhlongo and Others v S (A335/2010)

[2011] ZAFSHC 14 (27 January 2011)

[2011] ZAFSHC 14**COURT**

Free State High Court, Bloemfontein

BEFORE

Rampai, Ebrahim

CASE / FILE NUMBER

A335/2010

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Source record**FREE STATE HIGH****COURT, BLOEMFONTEIN****REPUBLIC OF SOUTH****AFRICA****Appeal No. : A335/2010****In the appeal between:-****RICHARD PHILANI****MHLONGOFirst****Appellant****ZAMA CYPRIAN****MTHEMBUSecond****Appellant****SIPHO LUCAS****MLANGENIThird****Appellant****and****THE STATE****.....Respondent****CORAM:**

RAMPAI, J et EBRAHIM,

J

HEARD

ON: 6 DECEMBER 2010

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 27 JANUARY 2011

- [1] The appellants were charged in connection with their alleged involvement in two hijacking incidents committed at Vrede on Tuesday, 23 March 2010. The two victims were allegedly attacked and robbed of the trucks and the cargos by armed men.
- [2] On 26 July 2010 they applied in the Vrede Regional Court for their release on bail. They were legally represented by a certain Mr. Sibisi during the bail hearing. Their application was opposed. On 6 September 2010 Mr. J.J. van der Westhuizen, the regional court magistrate, dismissed the application. They now come on appeal against that judgment. The appeal is likewise opposed.
- [3] The first appellant presented his application by way of a sworn statement. The version of this gentleman was contained in two documents – exhibit “a” (his sworn statement) and exhibit “b” (an Absa bank account statement). He gave no oral testimony and he called nobody to testify in support of his bail application. His written version was placed on record by his legal representative, Mr. Sibisi.
- [4] The first appellant’s application for his release on bail, pending his trial, was opposed in the court a quo. The respondent tendered the oral testimony of warrant officer J.J. van der Merwe, the investigating officer, in resisting the release of the first appellant on bail. In addition to such viva voce evidence against the first appellant, the respondent also relied on certain written forms of evidence, including but not limited to exhibit “h” – the first appellant’s statement before Mr. Green, the district court magistrate at Reitz.
- [5] The court a quo considered the two conflicting versions of the parties at length. Having done so, it came to the conclusion that no exceptional circumstances existed which allowed the release of the first appellant on bail.
- [6] The undisputed facts as regards the first appellant were profiled in paragraph 6, exhibit “a”. He averred that he was a South African citizen, 30 years of age. At the time of his arrest he was in the employ of Mzansi Africa Logistics where he was employed as a truck driver. He had worked for this particular company for one and a half years. He was a married man with two minor children. The first child was 10 years of age and the second 4 years of age. His wife was pregnant and the couple was expecting their third child.
- [7] Ms Mhlongo was not gainfully employed. He stated that he was the sole breadwinner. He and his family had lived in a rented house for the past three years immediately preceding his arrest. He owned certain movable properties, among others, a motor vehicle which was still subject to the hire-purchase agreement. He had no previous convictions.

- [8] The undisputed facts, as regards the respondent's case, can be extracted from the testimony of the investigating officer. On 23 March 2010 two cargo carriers were en route to Secunda from Durban. They were owned by the company called Mzansi Africa Logistics. The cargo of each truck was liquid petrol. The two tankers were following each other all the way from Durban up to Vrede. The first driver proceeded driving towards Standerton, when the second driver stopped to ascertain why his tanker was losing power. The two tankers were ambushed and hijacked by armed men on the outskirts of Vrede.
- [9] The second driver was overpowered, tied up and placed in the boot of a white sedan. The hijackers took control of the second tanker and followed the first tanker. They found the first tanker on the way. It was stationary along the road. The first driver was apparently waiting for the second driver, apparently unaware that his fellow workman had been hijacked. He too was attacked, overpowered, tied up and placed on the backseat of the same white sedan. From the scene of the second hijacking the two tankers and the sedan travelled towards Standerton.
- [10] The white sedan stopped on the way. The second driver heard gunshots. The sedan moved on again. It stopped again, apparently to offload the wounded second driver. Again it restarted and drove off. Later on it again stopped. The second driver was taken out of the boot, marched to the veld and tied to a tree. He was then left behind in the veld alongside a dirt rural road between Greylingstad and Standerton. He managed to unfasten himself in the early hours of the next day. Subsequently he reported the incident to Greylingstad police. He escorted the police to look for the first driver. The police found the first driver dead along the said rural road.
- [11] A sworn statement was obtained from a witness. A few days later the two tankers were found abandoned, one at Olifantsfontein and the other at Brits. Both tankers were empty. Mzansi Africa Logistics lost a total of 90 000 litres (45 000 litres x 2 tankers). The police tracked down a certain individual who had allegedly purchased some of the stolen fuel. Again a sworn statement was obtained from the witness. The first appellant was then arrested at Benoni on Monday, 19 April 2010, on the strength of the information obtained from the alleged buyer. The police seized his cellular phone. He was then taken to Villiers on 19 April 2010 where he made a statement – exhibit "I" – before Mr. T.J. Green, the district court magistrate. The investigating officer later obtained the first appellant's cellular communication records and the satellite tracing system records of the two hijacked trucks.
- [12] There were two criminal charges pending against the first appellant at the time of this arrest and bail application. The one charge related to the theft of a motor vehicle belonging to Mzansi Africa Logistics, the first appellant's employer. The truck involved was a petrol tanker. It was fully loaded with such liquid cargo when it was stolen from the depot of Mzansi Africa Logistics. The other charge related to robbery of a motor vehicle belonging to a company known as Vuyo Transport. Its driver was robbed of the truck at Viljoensdrift. The truck concerned was also a petrol tanker. It was also loaded with the same liquid cargo.

[13] The court a quo considered the two conflicting versions of the parties at length. Having done so it came to the conclusion that no exceptional

circumstances existed, which allowed the release of the first appellant on bail.

[14] The issue in the appeal before us is whether the foregoing conclusion was a correct consideration of the facts and a correct application of law on such

facts.

[15] On the one hand Ms Wright, counsel for the first appellant, submitted that an overall conclusion of the court a quo could not be sustained on appeal because, as she argued, the court a quo failed to strike a proper balance between the factors which favoured the release of the appellants and those which did not.

[16] On the other hand Mr. Harrington, counsel for the respondent, submitted that the conclusion reached by the court a quo was unassailable. His contention was that the first appellant had failed to discharge the onus of establishing that exceptional circumstances existed which allowed his release on bail.

[17] Now the rules of engagement – it is common cause that the appellants face schedule 6 charges. That being the case section 60(11)(a) of the Criminal Procedure Act, 51 of 1977, applies. The section places the onus on the accused person who applies for his release on bail to adduce evidence, which satisfies the court that exceptional circumstances exist which, in the interest of justice, permit his release. Unless the accused, charged with such scheduled offence, so satisfies the court, the court has to order that he be detained.

[18] To avoid detention pending trial, the first appellant had to satisfy the court a quo, on a balance of probabilities, firstly, that exceptional circumstances existed which permitted his release from detention and

secondly, if and only if he has proven the first requirement, that such existent exceptional circumstances indicated that his release

was in the interest of justice - *S v BOTHA EN 'N ANDER* 2002 (1) SACR 222 (SCA) at 230 d – f.

[19] The concept of exceptional circumstances, as contemplated in the section, must not be understood to mean unique circumstances out of this world above and beyond and entirely different from those enumerated in subsections (4) to (9) of section 60 – *S v DLAMINI*; *S v DLADLA AND OTHERS*; *S v JOUBERT*; *S v SCHIETEKAT*

[1999] ZACC 8; 1999 (2) SACR 51 (CC) par. 76 per Kriegler J. Therefore the test of exceptional circumstances is not as onerous as the phrase may seem to suggest.

[20] What section 60(11)(a) requires of an applicant for bail is that s(he) must show that such usually common or ordinary factors are, in her or his particular case, blended with some or other peculiar element, which gives such an ordinary factor an individualistic touch of

character - S v VANQA 2000 (2) SACR 371 (Tk) at 376 b – d per Jafta J, as he then was. Broadly speaking, exceptional circumstances within the meaning of the section will include, but not be limited to circumstances which tend to diminish the likelihood that the protected interest of justice may be undermined, frustrated or endangered by the release on bail of a detained suspect.

- [21] It will therefore be readily appreciated that the phrase “exceptional circumstances” means the ordinary factors or considerations for the grant of bail as set out in subsection (4) to subsection (9) of section 60, are not, without more, sufficient to permit the release of a bail applicant in a case where his right of personal freedom has to be considered against the backdrop of a whole range of other factors which, in the interest of justice, dictate that the release

of such bail applicant be debarred. A bare denial or shall I rather say a bare promise by a bail applicant that, if released from

detention, he will not abuse his freedom by offending or frustrating or endangering any of the variety of public interests protected in section 60 (4) is not in itself enough - S v BOTHA, supra. The five subsections (5) – (8) are important guiding factors, which must be taken into account in deciding whether any of the five interests of justice in subsection (4) disallows the release of the accused from detention or not.

- [22] The indefinable expression “exceptional circumstances” is a very elastic concept with a boundaryless ambit. Where a bail applicant can show that he will probably be acquitted at the end of the trial, such a probability may well be regarded as exceptional circumstances – S v JONAS AND OTHERS 1998 (2) SACR 677 (SE). Where it is shown by a bail applicant, on a balance of probabilities, that the prosecution case is so exceptionally weak that he will probably be acquitted, such weaknesses may be treated as exceptional circumstances. However it is incumbent upon the bail applicant himself to prove such weaknesses. He cannot expect the respondent state to do so for him - S v MATHEBULA 2010 (1) SACR 55 (SCA).

- [23] The onus rests on the bail applicant to satisfy the court that the interests of justice favour his release from detention. Until he has made out a prima facie case that there is no case for him to answer at the trial, there is no duty on the respondent state to rebut the bail applicant's

evidence - S v MATHEBULA, supra, 59 b – d.

- [24] The salient principle, that every case must be decided in accordance with its peculiar circumstances, applies. It is for the court, seized with a bail application, to make a value judgment informed by the peculiar circumstances of the case at hand. The court is then called upon to decide, by virtue of such value judgment, whether the proven circumstances, peculiar to that specific case, are in degree and in kind, of such a nature that they can be characterised as exceptional circumstances within the meaning of the section – S v BOTHA,

supra, 230 a – b.

[25] We are not sitting as a court of first instance. Sitting as we are in an appellate mode, we have no unlimited power or unfettered

discretion to interfere with the decision of the court a quo. Section 65 (4) curtails our appellate powers. We can only interfere with the decision of the court below, provided we are satisfied that the court below was incorrect. Unless it is shown by the detained suspects applying for bail, we, on appeal, are not at liberty to nullify the decision of the court a quo. If there is any doubt about the correctness or otherwise of such a decision, appellate interference is impermissible and the decision

stands.

[26] On appeal our powers to interfere with and also the decision of the court a quo, concerning bail, is restricted to cases where no doubt exists that the court a quo committed a material misdirection on either the factual matrix or the legal principles or both in an endeavour to resolve the conflict or contest between the detention or release of a suspected individual - S v MPULAMPULA 2007 (2) SACR 133 (E).

[27] In S v BARBER 1979

(4) SA 218 (D) the court held that the approach on appeal against the refusal by the court a quo to release the bail applicant on bail from detention, was whether it could be said that the magistrate, to whom discretion was entrusted

to order the release or further detention, had improperly exercised such discretion. We can set aside the decision of the magistrate on appeal provided we are satisfied that the decision he took at Vrede on 6 September 2010 was not compatible with a proper exercise of judicial discretion. We cannot interfere with the finding of the court a quo and substitute it with ours merely because we reckon that we, sitting as a court of first instance, would have exercised that discretion

differently. To do so would boil down to unjustifiable and unwarranted usurpation of the discretion entrusted not to us, but the

court a quo – S v BARBER, supra, at 220 E - F.

[28] The first appellant vowed that his release would not undermine the criminal justice system. The effective operation of the system can be jeopardised if the five pillars of its strength are weakened. The first appellant declared on oath that if released from detention he would not do anything likely to endanger any of those five basic safeguards of the system. A vow is of course an indication of serious commitment. His personal profile showed: that he had dependants whom he cared for; that he was emotionally tied up to his family; that he was gainfully employed; that he provided material support to satisfy their basic needs of subsistence; that he owned certain movable assets in respect of which he was financially responsible and that he had strong emotional attachment to the community and place of his abode.

- [29] The first appellant has been in custody since his arrest on 19 April 2010. He has been incarcerated for seven and a half months at the time we heard the appeal. He has certainly suffered a huge loss of earnings occasioned by his detention. His family is probably struggling to make ends meet, because he was the sole breadwinner. To all these and the foregoing factors must be added the weakness, if any, in the prosecution case. There are two aspects in this regard which stands to favour the first appellant. The first is that the surviving driver cannot identify the hijackers. The second is that no identification parade was held.
- [30] These then are the strong factors favourable to the first appellant's case. When they are considered in isolation they tend to indicate that the first appellant's right to personal freedom is likely to suffer prejudice if he were to be detained. But the first appellant's personal freedom is not an absolute right which overrides all. In considering his right to personal freedom against the imperative duty of the respondent state to protect its inhabitants from crime, we have to decide the matter by weighing up the interests of justice – section 60 (9).
- [31] The police have obtained statements by certain individuals, who allegedly claimed, that the first appellant sold to them bulks of petrol. This is the first strong point of the prosecution case.
- [32] The mobile cellular record of the first appellant's cellphone indicated that someone who was in possession of the first appellant's cellphone was in the Vrede district before, during and after the hijacking of the two fuel tankers. From Vrede the movement of his cellphone could be traced to Boksburg via Standerton and Germiston where the first appellant lived.
- [33] The further evidence of the investigating officer was that before, during and after the two armed hijackings there were cellular contacts between the mobile phones of the first appellant and those of the second and the third appellants.
- [34] The satellite tracking records mapped the movements of the two hijacked fuel tankers. According to the investigating officer a definite match was found between the truck satellite route and the first appellant's cellular route. These then are the strong cornerstones of the prima facie case against the first appellant. He made no effort to rebut these various pieces of evidence which tended to incriminate him.
- [35] In dealing with the strength of the respondent's case, the weakness of the first appellant's case must be taken into account. They fortify the respondent's case in much the same way as the weaknesses in the respondent's case fortified the first appellant's case.
- [36] The most glaring weakness in the first appellant's case is that he chose to place his evidence before the court a quo by way of an affidavit. Because he did not subject himself to cross-examination, his evidence did not carry much weight. His mere paper denial of complicity in the crimes and lack of supporting evidence and lack of objective probabilities in favour of the first applicant, weakened his application - *S v MATHEBULA*, supra.

- [37] At paragraph 5, exhibit “a” the first appellant stated that he would plead not guilty to the charges but ventured to say nothing about the merits of the case. He said no word about his exact whereabouts at the time the two fuel tankers were hijacked at Vrede, far away from his place of residence at Germiston. He said nothing about his cellphone or its apparent incriminating movement before, during and after the incident or the equally incriminating cellular contacts between his cellphone and those of his co-appellants at all times material to the hijacking.
- [38] It was incumbent upon the first appellant to make out a prima facie case that there was no substance in the respondent’s case against him – *S v MATHEBULA*, supra, at 59 g – h. An evasive appellant who shies away from dealing with the facts, as alleged by the prosecution and the probabilities inherent in such factual allegations, does so at his own peril.
- [39] It is common cause that the first appellant was on R2 000,00 bail when the two fuel tankers were hijacked at Vrede on Tuesday, 23 March
2010. At that time a case was pending against him in the Germiston Regional Court. The case relates to two trucks which were found in his possession. The one truck was stolen from the depot of Mzansi Africa Logistics, the first appellant’s employer. The other truck belonged to Vuyo Transport whose lawful driver was robbed and unlawfully dispossessed of the truck. Both trucks had petrol cargos at the time they were stolen and hijacked. The similarities between the Germiston-case and the Vrede-case are obviously striking. It cannot be said that the suspicion that the appellant was involved in both cases, is without any substance.
- [40] It is of outmost importance to bear in mind that, at this juncture, it was neither the task of the court below nor ours up here to make any provisional diagnosis of guilt. Ours is to consider whether the court a quo misdirected itself, on the facts or law, in assessing the strength and the weaknesses of the prosecution case - *S v VAN WYK* 2005 (1) SACR 41 (SCA) at 45 a – b.
- [41] Ms Wright submitted that the prosecution case against the first appellant was not as strong as the court a quo found. The basis of counsel’s argument was that, on a number of occasions the evidence of the respondent’s witness was that a possibility existed that the first appellant would again commit a crime if released on bail, whereas section 60 (4) requires a likelihood and not a possibility. Although the argument was factually correct, I am not persuaded that the respondent’s case was thereby fatally weakened. During the course of argument, ms Wright conceded that, notwithstanding certain weaknesses in the respondent’s case, it could not be said that the first appellant had established that the respondent’s case was so weak that there was no prima facie case to warrant his detention.
- [42] I am of the firm view that the concession was correctly made. Objective examination and analysis of the undisputed factual matrix, compellingly justifies the apprehension of the investigating officer and the finding of the court a quo that the likelihood exists that the first

appellant is likely to commit a similar offence again if he were released on bail. The release of the first appellant from detention is likely to undermine the proper functioning of the criminal justice system. I have to stress that I reached this conclusion without taking into account the averments contained in the first appellant's statement before the magistrate – exhibit "a".

- [43] The finding of the court a quo that the first appellant had failed to prove, on a balance of probabilities, that exceptional circumstances existed which permitted his release from detention, is a finding which, on appeal, I cannot hold to be wrong. The testimony of the first appellant fell short of the requirements of section 65 (4) of the Criminal Procedure Act, 51 of 1977. The balancing act in this matter tends to support the conclusion that the interests of justice are more likely to suffer greater prejudice if the first appellant were to be released than if he were to be detained pending the trial. On the facts I am inclined to dismiss the appeal.
- [44] In the second place I turn to the second appellant's application. He has narrated his version by way of an affidavit – annexure "c". His profile was set out in paragraph 6 thereof. He stated that he was a 28 year old South African citizen. His highest formal schooling level was grade 12. He was a married man and a father of two minor children. The first child was 8 years of age and the second one 2 years of age. He and his family lived in a rented house for the past six years. His wife was gainfully employed. At the time of his arrest he was in the employ of Unitrans Easigas where he was employed as a truck driver. He owned certain movable assets. Besides household furniture he also owned a motor vehicle. He had no previous convictions. Moreover, there were no pending cases against him at the time.
- [45] It was contended on behalf of the second appellant that the court a quo did not properly take into account his personal circumstances. He had been residing at Germiston for six years prior to his arrest. He was employed as a truck driver by Unitrans Easigas at Garfield Street, Alrode. He has been working there for the past two years. His previous employer was Sun Salt at Alrode where he also worked for two years. His wife was employed at Glenwood Hospital in Benoni. His parents lived at 184 Osizweni, Newcastle in KwaZulu Natal.
- [46] The second appellant declared on oath that, if released from detention, he would not do anything likely to jeopardise any of the five basic safeguards of the criminal justice system. His vow was an indication of his serious commitment and must be seriously considered. At the time this appeal was heard, he had been incarcerated for seven and a half months. His wages supplemented the family income in no small way. He has surely suffered a huge loss of earnings following his arrest and detention. Although he was not the sole breadwinner, his family has probably been struggling to survive without his contribution to the family income.
- [47] The second appellant had no previous convictions. There were no pending cases against him. The weaknesses in the prosecution case counted in his favour. The surviving truck driver was not in a position to identify the hijackers. These then were the strong factors

favourable to the second appellant's case. They tended to support the contention that his right to personal freedom was likely to suffer prejudice if he were to be detained. However, these favourable factors cannot be considered alone. His right to personal freedom must be considered together with the constitutional imperative of the respondent as a state to protect its inhabitants from crime. We are required to decide the matter by weighing up the interests of an individual versus the interests of the general public – section 60 (9).

- [48] The second appellant, like the first and the third appellants, has no emotional, family, community or occupational ties to Vrede or the Free State where he is to be tried. He has no fixed property anywhere. By the time the bail application was launched in the court a quo, the second appellant had already lost his job at Unitrans. Apparently he has no relative anywhere in this province. These then are some of the weaknesses of his application. Obviously they must be taken into account in weighing the strength of the prosecution case against him.
- [49] The investigating officer testified that the investigation showed that the crimes were thoroughly planned; that the hijackers were armed and that they did not hesitate to end human life in order to achieve their criminal objective. The hijacked motor vehicles were trucks. The second appellant, like his co-appellants, were employed as truck drivers. The second appellant did not dispute the evidence of the investigating officer that he was familiar with the fuel energy industry and how it operated. He was fingered out by the third appellant. He and the third appellant were friends, former school mates and fellow workers. They were in the employ of Unitrans Easigas and Unitrans Total at Alrode at the time of the arrest. The second appellant was the first appellant's brother-in-law. I have already found that there was prima facie evidence which implicated the first appellant. The second appellant was directly implicated by his friend, the third appellant. All these facts were undisputed by the second appellant.
- [50] It was also common cause that the second appellant's cellular phone was seized by the police. His cellular records revealed that before, during and after the hijackings the second appellant's cellphone was used in the district of Vrede. Moreover, his cellular record also showed that there were cellular contacts with those of the men accused with him namely, the first and the third appellants. The person who allegedly purchased the stolen petrol, has made witness statements to the police in which they implicated the second appellant's brother-in-law, the first appellant, as well as the second appellant's friend, in other words, the third appellant. Those witnesses now know that one of the drivers of the trucks whose fuel cargo they bought, was killed. The killing of the one truck driver, the fastening of the other to a tree, coupled with the threat to come back and to shoot him demonstrated just how high the degree of violence implicit in the hijackings incidents was. Naturally such witnesses can be expected to be concerned about their own safety in these circumstances now that they have implicated the sellers of the cargos.

[51] The second appellant lived at Germiston. The satellite tracing systems of the hijacked fuel tanker showed that from Vrede they travelled to Standerton, Germiston and Boksburg. One of the tankers was emptied at Germiston, the second appellant's place of residence. The second appellant made a statement to Captain Mosoaliba. I refrain from making any comments as regards this statement. These then were the strong pillars of strength in favour of the respondent's prima facie case against the second appellant.

[52] The court a quo commented about the strength of the prosecution case:

"Mnr. Sibisi val glad nie die ander getuienis aan wat die applikante 1, 2 en 3 met die pleging van die misdryf verbind soos deur die ondersoekbeampte getuig nie."

These comments by Mr Van der Westhuizen, regional court magistrate, cannot be faulted in any way.

[53] The case against the second appellant, and indeed all the appellants, did not revolve exclusively around the so-called confessions as embodied in exhibit "h", exhibit "i" and exhibit "j" by the first appellant, second appellant and third appellant respectively. The gravamen of the respondent's case derived a whole lot more persuasive force and probative value necessary for the making of a value judgment from the undisputed extrinsic evidence.

[54] The weaknesses in the second appellant's case have to be taken into account in determining the strength of the respondent's case. I have already pointed out the negative effect and the limitation of presenting a written bail application. The comments and views I expressed in respect of the first appellant, apply equally well to the second appellant. Like the first appellant, the second appellant was not candid to the court a quo. He too chose to play his cards close to his chest – paragraph 5, exhibit "c". The court was in the dark as to the exact whereabouts of the second appellant at the time the two fuel tankers were hijacked at Vrede, far away from his place of residence. He elected to say nothing about his cellphone or its apparently suspicious use at Vrede or its suspicious movements before, during and after the incidents from there to the East Rand or its equally questionable contacts with the cellphones belonging to the first appellant and the third appellant, the two gentlemen who appeared to be seriously implicated in this entire episode.

[55] I am not persuaded that the court a quo misdirected itself in refusing the second appellant's application to be freed on bail. The second appellant dismally failed to discharge the onus of establishing, on a balance of probabilities, that exceptional circumstances existed which warranted his release and that releasing him would have been in the interests of justice. I am not satisfied that in circumstances such as these it can be said that the decision of the court a quo was so wrong as to justify our interference. In the circumstances we have no reason to interfere with the decision of the court a quo – S v BARBER, supra.

[56] In the third and final place I turn to the third appellant. He placed his version before the court a quo by way of an affidavit – exhibit "f". His profile is outlined in paragraph 7 thereof. He stated that he was born at Newcastle. He was a citizen of the RSA. He passed grade 12. He

was a married man. He had three dependent minor children. He lived at Orange Farm south of Johannesburg with his family. He had been living there for the past six years. He rented the place from his uncle. His wife was pregnant. She was expecting their fourth child. He was employed by Unitrans Total at Alrode. He was a truck driver at the time of his arrest. He owned movable property, which consisted of household furniture, domestic appliances and a motor vehicle, among others.

- [57] He stated on oath that, if he were released on bail, he would not abscond; that he would not intimidate witnesses; that he would not conceal or destroy evidence; that he would not endanger public safety; that he would not commit any crime; that he would not undermine the objectives of the criminal justice system or its proper functioning and that he would be willing and able to comply with bail conditions.
- [58] His vow was an indication of his serious commitment to do or to refrain from doing something unlawful. Therefore a statement made on oath must be seriously considered. The third appellant had been held in custody since his arrest on 20 April 2010. At the time this appeal was heard he had been incarcerated for seven and a half months. During that period he certainly suffered a huge loss of earnings, following his arrest. It seemed he was the sole breadwinner. His family has probably gone through trying times and the hardship will probably worsen with the passage of time.
- [59] The second appellant has no previous convictions or pending cases. The weaknesses of the prosecution case must count in his favour. The surviving victim was apparently not in a position to identify any of the hijackers, which was why no identification parade was held.
- [60] The factors outlined in the foregoing paragraphs were strong factors favourable to the second appellant's case. They tended to support the contention that his rights to personal freedom was likely to suffer prejudice if he were detained. However, these favourable factors could not be considered alone in a separate compartment. His assurances or undertaking or denials must be substantiated by objective facts and inherent probabilities. A proper balance has to be struck between his interests, as an individual, and the interests of the public at large – section 60(9).
- [61] The investigating officer testified that the investigation showed that the crimes were thoroughly planned; that the hijackers were armed' that they did not hesitate to break the slightest resistance of one truck driver by shooting him dead; that the charge of murder would probably be added to the two charges of robbery with aggravating circumstances and that the incidence of hijacking fuel tankers was on the increase on the highways. The hijacked motor vehicles were trucks. The third appellant was employed by an oil company as a truck driver. He did not dispute that he was familiar with the fuel energy industry and how it generally operated. He was fingered out by the first appellant. He and the second appellant were boyhood friends, former school mates and co-employees of the same oil company. I was at pains earlier to show how the first appellant and the second appellant were implicated by the unchallenged evidence of the investigating officer.

- [62] Besides the cellular records of the third appellant's cellphone, the satellite records of the trucks, his arrest by virtue of the information received from a highly implicated suspect - the surviving truck driver apparently informed the police and gave them a statement to the effect that the hijackers were using a white Polo. It is common cause that the third appellant was the owner of a white Polo Classic sedan. The sedan was traced at a panelbeating place at Orange Farm with a bullet hole in the roof, body resprayed with a different colour paint and stripped off of the rear seat and a spent cartridge was found inside the car.
- [63] Now all this suspicious conditions of the third appellant's sedan tallied very well with the version of the surviving truck driver that the other truck driver was immobilised and placed on the back seat of the white Polo; that he heard a gunshot inside the sedan before the wounded truck driver was dumped along the road. According to the panelbeater's statement when the third appellant delivered the sedan to him for repairs, its backseat had already been removed. It is probable that the backseat was removed because it was bloodstained by the wounded truck driver. The third appellant made no attempt to explain all these suspicious circumstances in which his car was found within four weeks after the hijacking.
- [64] The question which arose from these undisputed facts, was what weight could the court have attached to the solemn oath of a man that he will not conceal or destroy evidence when there is already prima facie evidence that such a man was suspected and associated with such an elaborate scheme to destroy evidence – section 60(4)(c)?
- [65] The suspicious conditions of the third appellant's car coupled with his election to give no oral evidence, were serious weaknesses in his application. Such weaknesses bolstered the respondent's case. The views I have already expressed in connection with the first appellant apply equally well to the third appellant. He made no effort to rebut the adverse cellphone evidence, which indirectly suggested that at the critical moments of the fateful night, he was not home at Orange Farm, but at Vrede. Moreover, the further evidence of the investigating officer was that the third appellant pointed out to the police a buyer to whom a total of 50 000 litres of petrol was sold by the hijackers. This aspect alone strongly militates against any contention that the respondent's case against the third appellant had no substance.
- [66] Once again I am not persuaded that the court a quo committed any material misdirection in dismissing the third appellant's application for his release on bail. He too has not discharged the onus. There are no proven exceptional circumstances in existence which permit his release. This was the finding of the court a quo. Instead, the interests of justice, which emerged from the comparative analysis of the objective balancing of the interests at stake, dictate that it is necessary to have the third appellant further detained to ensure a fair trial to all concerned.
- [67] Accordingly I make the following order:
- 67.1 The appeal in respect of all the three appellants is dismissed.
- 67.2 The appellants shall remain in detention pending the finalisation of their trial.

M.H. RAMPAL, J

I concur.

S. EBRAHIM, J

On behalf of appellants: Adv. G.J.M. Wright

Instructed by:

Richter-Van der Walt

FRANKFORT

On behalf of respondent: Mr. W.J. Harrington

Director of Public Prosecutions

BLOEMFONTEIN

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Prepared on 14 October 2026 · Esheria