

SOUTH AFRICA / JUDGMENT

Nowtham v S (A2025/091731)

[2025] ZAKZDHC 50 (7 August 2025)

[2025] ZAKZDHC 50**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

A2025/091731

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
Case no: A2025-091731

In the matter between:

SHIRWIN
NOWTHAM
APPELLANT
and
THE
STATE
RESPONDENT

Coram:

Mossop J

Heard:

7 August 2025

Delivered:

7 August 2025
ORDER
The following order is

granted:

The appeal against the
judgment of the Verulam Magistrate's Court, delivered on 14
March 2025, refusing to admit the appellant
into bail based upon new
facts is dismissed.

JUDGMENT

MOSSOP J:

- [1] This an ex-tempore judgment.
- [2] This is an appeal against the refusal by an additional magistrate of Verulam, a Ms Badal (the magistrate), to admit the appellant into bail based on the alleged existence of new facts.
- [3] The appellant had previously applied for bail before the magistrate. On 4 October 2024 that application was refused. The appellant did not challenge that decision by appealing it, but elected, rather, to later renew his application for bail based upon the alleged existence of new facts. Judgment in that application was delivered on 14 March 2025, and the appellant's application was again unsuccessful, hence this appeal.
- [4] The appellant has been charged with a count of murder and a count of attempted murder, both of which offences are alleged to have occurred on 29 August 2024.[1] It is not in dispute that the count of murder falls within the ambit of schedule 6 of the Criminal Procedure Act 51 of 1977 (the Act) and it thus follows that the appellant was required to establish exceptional circumstances that would justify his release from custody.[2]
- [5] The State alleges that the appellant murdered a former employee of his (the deceased), and shot a second former employee, who fortuitously survived his shooting (the survivor). The instrument used in the murder, and the attempted murder, was a shotgun. Prior to the shooting, the survivor explained in a statement that he made that he and the deceased had been picked up by the appellant and a person described by him as being 'Stephen,' who were travelling in a grey Polo motor vehicle. The survivor explained that he and the deceased had previously worked for the appellant and Stephen selling drugs and that they had agreed to get into the motor vehicle as:
- '... they promised us another job.'
- [6] They were made at a certain point to get out of the motor vehicle and:
- 'Sherwan (sic) then took the firearm which was inside the vehicle and shot at us both.'
- [7] Based upon the initial statement of the survivor regarding who had shot him and the deceased, and presumably also other evidence that it had at its disposal, the appellant was tracked down by the South African Police Services (SAPS) and taken into custody on 14 September 2024, where he has remained ever since.
- [8] I need not go into any detail about the initial refusal of bail. That decision was not taken on appeal and must therefore be regarded as being correct. The appellant chose to proceed, rather, on the basis of new facts.

- [9] Three new facts were alleged to exist: the continued illness of the appellant's son; the appellant's on-going hypertension, and the survivor's recanting of his allegation that the appellant is the person who shot and killed the deceased and shot and wounded him. These facts were not given in oral evidence by the appellant but were presented by way of an affidavit placed before the court by his legal representatives.
- [10] The most significant of the new facts alleged to exist appears to be the last one just mentioned, namely that the survivor had recanted his allegations against the appellant. It is important for a proper understanding of the competing allegations that surround the alleged recanting by the survivor of his statement to consider the chronology of relevant events, as I now do:
- (a) The survivor's written statement implicating the appellant as the shooter was deposed to by him on 11 September 2024;
 - (b) On 15 November 2024, the appellant's erstwhile attorney, a Mr Gounden, referred in court to an affidavit deposed to by the survivor in which he allegedly recanted his statement that the appellant was the shooter. That document was alleged exhibited to the public prosecutor on a cellular telephone by the attorney, but has never been submitted to the court and is not part of the appeal record;
 - (c) On 18 November 2024, presumably in response to the previously mentioned document on the attorney's cellular telephone, the survivor deposed to another affidavit in which he confirmed that he had been shot by the appellant and that the appellant had telephoned him from prison in which conversation the appellant told him to:

'... change my statement, that I was shot by Stephen and he promised me an amount of R5 000 which he will send through his friend by the name of Lunga.'

He confirmed that he had received the promised payment of R5 000 from Lunga and that he was promised a further R20 000 if he went to court on 27 November 2024 and withdrew the charges against the appellant. He indicated that he did not wish to do so, and indicated that:

'The person who shot at us was Shirwan (sic) with big gun black in colour.'

The witness statement and the statement dealing with the offering of a bribe were manuscript statements made to a SAPS official.

- (d) On 25 November 2024, an attorney by the name of Mr Mondli Mthethwa (Mr Mthethwa) deposed to an affidavit in which he stated that the survivor approached him in the company of two other males and indicated that he wanted to make a statement to him that the appellant was not the person that had shot him. The survivor explained that he had approached Mr Mthethwa after he had first approached the SAPS and had been told that they did not want to take his statement. Mr Mthethwa then took down the statement and sent the survivor to court to have it commissioned. That statement, like the previously referred to telephone statement, has never been seen again and is also not part of the appeal

record;

- (e) On 20 January 2025, the survivor consulted with another attorney, namely a Ms Ivy Mukweka (Ms Mukweka). She took down another statement from him in which he stated that:

‘I confirm that the accused Mr. Sherwin Nowtham did not do anything to hurt me, or commit any acts that are unlawful against me.’

He went on to state that the person that had shot him was ‘Stefon’ and that the appellant was entirely innocent.

- [11] This change of version of the survivor, so the appellant alleged, has brought about the ruin of the State’s case against him, and he confidently stated in his affidavit in the renewed bail application that the consequence:

‘... would be the end of the State’s case;’

- [12] Thus, the appellant reasoned that this development constituted a new fact that was in its very nature compelling and exceptional and would entitle him to be granted his liberty pending his trial if the trial was even able to proceed in the light of the survivor’s final revelations.

- [13] There can be no doubt that there is substantial uncertainty

concerning what the survivor’s definitive version is. But, as Mr Singh, who appears for the State argued, that is not the end of the matter, despite what the appellant’s legal representatives believe the position to be. There are other facts that the appellant chooses not to focus upon that point to his involvement in the events in question.

- [14] The first is that the deceased did not die immediately upon being shot. He lingered in this world sufficiently long enough before slipping away to give a description of who shot him to those who came to his assistance at the scene as he lay dying. The deceased indicated that the person who shot him was the appellant.

- [15] It was suggested by Mr Khan SC, who appears for the appellant, that there is something unsatisfactory about the introduction of this dying declaration. The defence were apparently told that the State possessed the evidence of a dying declaration. The defence assumed that to relate to the survivor and not the deceased. I am not sure how that conclusion could have been entertained, for the survivor did not die. Anything that he said was, therefore, not a dying declaration. The deceased did die and what he said was therefore a dying declaration. That dying declaration was heard by a security guard (the security guard) who, alerted by the sound of the shooting, proceeded to the scene where he found the injured survivor and the dying deceased. Mr Khan suggested this was plucked out of the ether by the State and had only been mentioned in closing argument at the renewed bail application, but Mr Singh conclusively established that this was incorrect by referring to the following extract from the investigating officer’s affidavit delivered in the renewed bail application:

‘The deceased made a dying declaration to the security officer who arrived on the scene...’

The admissibility of that evidence may later be contested at trial, but it is evidence that the magistrate was entitled to consider when determining the outcome of the appellant’s renewed bail application.

- [16] There is other evidence that links the appellant with the crime. He had recently purchased a grey Polo motor vehicle that had ‘CY’ registration plates affixed to it. According to the survivor, that motor vehicle was used to convey him and the deceased to the place where they were shot. That allegation has not been recanted by the survivor. The security guard apparently stated that he had observed a grey Polo motor vehicle with CY registration plates leaving the scene. Immediately after the shootings, the motor vehicle was returned to the dealer who had sold it to the appellant, and it was apparently swapped for another motor vehicle. Why this strange turn of events occurred was not explained by the appellant.
- [17] In addition to this, the State apparently also has evidence from cellular telephone transmission towers that places the appellant’s cellular telephone in the vicinity of the place at which the shootings occurred.
- [18] Following upon a consideration of all these facts, the magistrate concluded that the application for bail based on the so-called new facts should fail.
- [19] The issue of an appeal against a refusal of bail by a lower court is governed by s 65 of the Act. Section 65(5)(1)(a) reads as follows:

‘An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.’

[20] Section 65(4) of the Act provides 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.’

[21] When considering an application for bail, a lower court is introduced to certain competing facts, which it is required to assess and evaluate, and it then attempts to divine what may occur in the future. In doing so, the lower court is faced with the challenging task of balancing the applicant’s right to liberty against the interests of justice. If it believes there will be no risk to the administration of justice, it may decide to release an accused person from custody. If it concludes that the interests of

justice will be imperilled by the release of the applicant, it will decline to order the accused person's release. In coming to that decision, the lower court unquestionably exercises a discretion.

[22] By virtue of the existence of, and the exercise of, this discretion, an appeal court has limited opportunities to intervene in the decision taken by the lower court concerning bail. As was observed in this division in *S v Barber*:^[3]

‘It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. This Court must be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own 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 bail exercised that discretion wrongly.’

[23] The magistrate gave a reasoned judgment. The payment allegedly made on behalf of the appellant to the survivor to secure his co-operation featured prominently in that judgment, as it rightly should. The magistrate mentioned, and the record confirms this, that the appellant's erstwhile attorney Mr Gounden had, indeed, informed the court previously that a friend of the appellant:

‘... may have given him some money for food or medical attention or whatever, ...’

It appears therefrom that the fact of the payment mentioned by the survivor is not seriously in dispute, merely its intended purpose.

[24] The magistrate correctly rejected the multiple allegations of alleged illness advanced by the appellant as constituting new facts. Those conditions that he and his son allegedly suffered from existed at the time of his initial, unsuccessful, bail application. The only possible fact that may have been new was the sequence of affidavits deposed to by the survivor.

[25] The magistrate, correctly in my view, found that the affidavits deposed to by the survivor were ‘shrouded in controversy’ and concluded that the survivor may face criticisms regarding his credibility at the trial, but that was also an issue for the trial court to deal with. That may be so, but if it transpires that the appellant, in fact, offered an inducement to the survivor to get him to recant his earlier identification of him, it will place the appellant in an extremely difficult and invidious position.

[26] Objectively speaking, the circumstances under which the affidavits that purported to exonerate the appellant came into existence are extremely strange. The survivor described himself in the affidavit drafted for him by Ms Mukweka as being an adult unemployed and unmarried male. In addition, he was apparently a person who had to be given a handout to purchase groceries, yet he was prepared to consult with two different private attorneys to

prepare two statements. Why did he consult private attorneys? Where did he get the money to do this from? Why did he simply not report what he wished to say to the investigating officer and thereby avoid the cost that he must indubitably have incurred consulting with private attorneys? I do not accept, as allegedly stated by the survivor and as previously mentioned, that the SAPS refused to take his statement. The answers to these questions are not immediately obvious.

[27] The survivor's statement that he had been contacted by the appellant from prison to get him to change his version was an important piece of evidence that was never recanted by the survivor. All that he recanted related to the actual shooting. The magistrate carefully considered that evidence.

[28] Because of her understandable misgivings with the new evidence, the magistrate still considered the case against the appellant to be a strong one. The magistrate also found that the uncertainty over what the true and definitive version of the survivor was did not satisfy the obligation of the appellant to establish the existence of exceptional circumstances that would justify his release into bail. I am satisfied that this was a correct conclusion.

[29] I am not persuaded that the magistrate has erred at all in coming to her decision, and I am not able to find that the conclusion

that she came to was the incorrect one. The evidence of the survivor that the appellant was able to reach him and influence him

notwithstanding the appellant's continued incarceration is compelling evidence of his willingness to interfere with State

witnesses, a conclusion to which the magistrate correctly came. Indeed, this matter is suffused with the insidious spectre of the

manipulation of the survivor, which, naturally diminishes the value of the final exculpatory affidavit to which he subscribed. Such interference is a blight upon the administration of justice and cannot be permitted to repeat itself.

[30] Ultimately, despite all the controversy over the affidavits prepared by the survivor, it may not matter who actually fired the shots that injured and killed if the State charges the appellant with those crimes based upon the doctrine of common purpose.

[31] The magistrate was required to scrupulously consider all the evidential material placed before her, not just the new facts.[4] She did so and explained and justified the decision to which she came. I cannot find fault with the way she exercised her discretion,

nor can I fault the decision to which she came on the evidence before her. In other words, she did not exercise her discretion wrongly. In the circumstances, I am unable to interfere in her decision.

[32] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the appellant:

Mr M S Khan SC

Instructed by:

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Verulam

Counsel for the respondents:

Mr K Singh

Instructed by:

Director of Public Prosecutions

Durban

[1] The appellant was also at one stage charged with corruption and there was, at the very least, a prospect that he would be charged with obstructing the course of justice. But I was advised from the bar by both counsel that both these charges have subsequently been withdrawn.

[2] See s 60(11)(a) of the Act, which provides that ‘Notwithstanding any provision of this 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, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.’

[2] See s 60(11)(a) of the Act, which provides that

‘Notwithstanding any provision of this 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, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.’

[3] S v Barber 1979 (4) SA 218 (D) page 220E-F.

[4] S v Vermaas 1996

(1) SACR 528 (T) page 531f-g.

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