

SOUTH AFRICA / JUDGMENT

Nyembe and Another v S (CA&R67/2019) [2019] ZAECMHC 78 (8 November 2019)

[2019] ZAECMHC 78

COURT

Eastern Cape High Court, Mthatha

BEFORE

H. S. Toni

CASE / FILE NUMBER

CA&R67/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

{EASTERN

CAPE LOCAL DIVISION, MTHATHA}

Case

no. 317/2019

Appeal Case no.

CA&R67/2019

In

the matter between:

LOYISO

NYEMBE

First

Appellant

THEMBISILE

SIXAKAZA

Fourth

Appellant

And

THE

STATE

Respondent

JUDGMENT

TONI AJ

Introduction

- [1] This is an appeal against refusal by the magistrate for the district of Cala, Mr Fourie, to grant the appellants bail. The bail appellants, Loyiso Nyembe and Thembisile Sixakaza, who are accused no. 1 and 2, respectively, were bail applicants no. 1 and 2 in the court a quo. They were charged with offences referred to in Schedule 6 of the Criminal Procedure Act[1] (“the Act”). This being common cause, the appellants bore the onus to prove that exceptional circumstances exist for them to be released on bail. Both applicants were legally represented both in the court of first instance and in this court.
- [2] The appellants’ application for bail before the court a quo was brought in terms of section 60 (11) (a) of the Act. This section provides, in essence, that an accused charged with a schedule 6 offence must be detained in custody pending his or her trial, unless he or she “adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.”
- [3] Both appellants were arrested by members of the South African Police Service (SAPS) and have been in detention since 29 November 2018 and 1 December, respectively. They were charged with one count of murder and possession of unlicensed fire-arm. They have spent almost a year in custody and their case has been remanded to proceed in this court on 24 November 2019.
- [4] In the court a quo, the first appellant did not adduce viva voce evidence. Instead, his evidence was imported into the record by means of a statement prepared on his behalf by his legal representative, Mr Zepe. This being the case, the state did not enjoy the benefit of cross-examining the first appellant.

The second appellant adduced evidence and was cross-examined by the state. Upon weighing and considering the evidence before him, the learned magistrate found no existence of exceptional circumstances warranting the appellants’ release on bail.

Put otherwise, the learned magistrate found that it was not in the interest of justice that the appellants be released on bail and this gave rise to the current appeal.

Grounds for Appeal

- [5] The grounds of appeal which jelled into appellants’ argument at the hearing are that the learned Magistrate misdirected himself in numerous ways in not finding the existence of exceptional circumstances that permitted the release of the appellants on bail.

- [6] In relation to the first appellant it was contended that the learned Magistrate erred: (a) in not finding that the first appellant had established a defence which had reasonable prospects of success at trial, (b) in not seriously considering the health condition of the first appellant whilst the facts revealed that the first appellant suffered from diabetes and hypertension and had in proof thereof a medical certificate supported by affidavit. It was argued that on further assessment by a doctor at Frontier Hospital whilst in custody, the first appellant was diagnosed of urinating blood consequent to assault inflicted on him and had a constitutional right to adequate medical treatment (c) in not finding that the state's case was weak with no forensic evidence or evidence of eye witnesses to support it, (d) in not considering that the appellant would stand trial as has been the case in the past, cannot interfere with state witnesses or evade trial and will not undermine or jeopardise the administration of justice, and (e) in not finding that the first appellant's employment which, taken cumulatively with others, constitute exceptional circumstances and would be seriously jeopardised by his continued detention
- [7] In relation to the fourth appellant it was contended that the learned magistrate erred: (a) in finding that the second appellant had propensity to commit crimes (referring to a case of robbery at Qumbu in which the second appellant was subsequently granted bail and had charges against him withdrawn), (b) in finding that the state gave evidence linking the second appellant in contradistinction to the investigating officer's evidence delinking the second appellant from the commission of the offences charged coupled with his refusal to participate in the murder of the deceased, (c) in linking the firearm alleged to be found in the possession of the fourth appellant to the strength of the state's case against the forensic expert's findings that the cartridges fired are negative with the firearm mentioned. The learned Magistrate should not have relied on the investigator's evidence in this regard, so the fourth appellant say, (d) in accepting the investigating officer's evidence that the state fears for the safety of state witness and the investigator whilst there was no evidence against the second appellant in this regard, (e) in accepting that there are probabilities that if released on bail the fourth appellant would be attacked by members of the community whilst the fourth appellant's home is located almost 250 km away from Cala, (f) in finding that there is no financial risk likely to be suffered by the fourth appellant, (g) in disregarding the weight attached to conspiracy cases and
- (h) the fourth appellant's election not to engage on the merits of the case reflected adversely on his bail chances.

Issue lying for determination

- [8] The crisp issue lying for determination is whether the learned magistrate misdirected himself and erred in his findings of non-existence of exceptional circumstances as alleged by the appellants.

The first appellant's affidavit

- [9] In the affidavit read by Mr Zepe, the first appellant stated that he is a South African citizen and was 45 years old. He was born at Qumbu and stays at 41 Voortrekker Road, Elliot which he regards as his permanent place of residence. He neither has relatives nor assets outside South Africa and has no passport or travel document. He is a head of traffic at Sakhisizwe municipality where he is permanently employed and is also a stock farmer with a flock of approximately 80 sheep and 40 pigs. He owns a house located Mbuqe Extension, Mthatha valued at R700 000.00 over which is registered a mortgage bond with monthly repayments of R4000.00. He also owns two motor vehicle valued at over a million rand.
- [10] He is married with four kids aged 18 years, 15 years and 13 years. The age of the last born is not mentioned. All the children are attending school and he is responsible for payment of their maintenance and support as well as school and tuition fees for the first born child.
- [11] He is diabetic and is on medication for high blood pressure in confirmation whereof he has a medical certificate from the doctor. He has an operation on his back owing to a motor vehicle collision which becomes affected in inclement weather. He was diagnosed of urinating blood whilst in custody by a doctor at Frontier hospital, Queenstown as a result of assault by police.
- [12] The first appellant stated further that he had no previous convictions and had a fraud case pending since 2013 in the Elliot regional court in which he is out on R10 000.00 bail. In relation to the case at hand the first appellant stated that he will plead not guilty but accepted that the offence charged falls under schedule 6 of the Act, it being his concession that he must prove the existence of exceptional circumstances for his release on bail. He denied having committed murder, it being his contention that the state case is weak as there is no evidence linking him to murder.
- [13] He contended further that his release on bail will not endanger the safety of the public and there is no evidence that he will disturb public order or undermine public peace. There is also no likelihood that he may evade trial. He did know the state witnesses in this case and there is no likelihood that he could interfere with them. He cooperated with the police during his arrest and furnished them with all the relevant information.
- [14] He had been in custody since 29 November 2018 and had been advised that it may take more than 6 (six) months before his case could be finalised which he contended is too inordinate a period for him to prove his innocence. His continued incarceration will have a detrimental effect not only to him but also on his family as he will be unable to support his children and may lose his employment.
- [15] In relation to the offence with which he had been charged he stated that on the day of the alleged incident he was at Elliot. He advised the members of the SAPS to visit the garage he was sitting in a double cab with one Mkwande Nyembe, a friend which he says should be captured in the CCTV from the time he arrived up to the time he left. He, therefore, could not have been at Cala on the date of the alleged murder. At the time of his arrest he was brutalised, tortured, traumatised, suffocated with plastic bags and assaulted. He was forced

to sign a statement under duress by the police.

- [16] In conclusion the first appellant submitted that he discharged the onus to show the existence of exceptional circumstances warranting him to be released on bail and undertook to abide by the bail conditions should bail be granted. As alluded to above, nothing turned out of the first appellant's affidavit as no cross examination could ensue on the allegations contained therein.

The fourth appellant's evidence

- [17] Before the second appellant testified his Counsel, Mr Matoti, volunteered an intimate disclosure that the second appellant had two previous convictions relating to a schedule 1 offence, three previous convictions of non – schedule offences and one pending case. The above having been said, the second appellant testified that he fathers three children aged 9, 7 and 5 years of age from different mothers. One is staying with him at Qumbu and the two others are staying with their mothers in Cape Town. He is responsible for the maintenance of his last born minor child who has been staying with his grandmother, the appellant's mother, since his incarceration. He is responsible for supporting his minor children and is also paying for their school fees and their school uniforms. One of the children has been taken by his mother whilst he is detention as his family cannot afford to support him. The appellant's mother lives on old age pension grant and is also dependent on the fourth appellant for her maintenance and support.
- [18] He stated further that he owns 49 sheep and five bakkies out of which he makes a living by conveying members of the community to town for reward. He has siblings but none of them are working. He is the only one who is responsible for supporting his mother.
- [19] He was arrested at Lily B & B, East London, which he used as a temporary accommodation on or about the 6th December 2018 and was taken to Qumbu on the same day where he was charged for business robbery. He is out on bail of R3000.00. He had been in detention since his arrest. Nothing has changed in his personal circumstances since his arrest save that he experienced asthma attacks whilst in custody.
- [20] He will plead not guilty to the charges. He made a confession which was not read back to him and in which he stated that he told those who wanted to commit murder that he did not want to be involved. He did not know any of the state witnesses and he will attend court when directed to do so by the court. He stated that he would not disturb public order if released on bail.
- [21] His continued detention will have adverse effects on his mother and the minor children who have no one to support them in his absence. He used to convey his kids to school on his bakkie. His used spares business is managed by his younger brother and it will be adversely affected by his continued detention as his younger brother has his own business to look after.

- [22] In cross – examination he insisted on his innocence and that there is nothing that links him to the commission of the offence with which he is charged. He denied that the firearm used in the murder and live ammunition were found in his possession. Whilst he conceded that the first appellant's Mercedes Benz motor vehicle allegedly used as a getaway vehicle after the murder was committed was found in his possession he, however, stated that the first appellant had borrowed his bakkie and left his Mercedes Benz with him. He further stated that he was not aware that the motor vehicle was used as a getaway vehicle. He also denied that he was involved in the planning of the murder.

The evidence of Brigadier Ngculu

- [23] In opposing bail the state called the investigating officer, Brigadier Ngculu, ("Ngculu"), to testify. In her testimony Ngculu stated that the first appellant was charged for fraud and corruption in which one Nobhongoza, ("the deceased"), was a whistle blower. The first appellant threatened Nobhongoza and used one of the state witnesses who was an employee under him to conspire and kill the deceased. The said witness was in a place of safety for fear that the first appellant 'could threaten or do something' to the witnesses if released. The witness received calls from the first appellant whilst in custody that when he is out of detention this witness will follow the deceased. According to Ngculu the first appellant has a hit list among which are also politicians.
- [24] Another witness who was in custody with the first appellant would also be in danger if he were released as he disclosed the details relating to the murder. This witness had also been threatened and two men were interrupted before doing something against the witness. Ngculu stated further that the first appellant should be kept in custody also for fear of reprisals as the community members who had a petition against the first appellant's release would attack him because of the anger they harbour after the deceased was killed.
- [25] Ngculu denied that the state's case against the first appellant was weak. She stated that the first appellant conspired the murder of the deceased and also hired people to kill him. Ngculu stated further that the first appellant made sure that on the day of the murder he would be in a place where there are cameras to obviate any link to the murder. Ngculu also told the court that the evidence against the first appellant was strong. She, however, conceded that the first appellant had no previous convictions.
- [26] On resumption of the bail application on 28 January 2019 the public prosecutor sought leave of the court a quo for Ngculu to supplement her testimony on account of new evidence. The new evidence was that on 14 January 2019 she consulted with another state witness for the purpose of informing the witness that she was considering releasing her motor vehicle which was used in the commission of the crime. The said witness informed her that she was working under the first appellant as a traffic examiner and it would not be appropriate to release the first appellant on bail as the first appellant would kill her upon his release.

- [27] In relation to the fourth appellant Ngculu stated that the former had no fixed employment and that he had no reason not to evade trial if he were released on bail. Ngculu confirmed that the fourth appellant has a motor vehicle which he uses as public transport but nothing would suffer in his absence. He also confirmed that the fourth appellant is known for committing crimes and evading trials. The second appellant was arrested in East London and had no idea why he was arrested. He, however, confessed that he got involved in the case because of his cousin, the first appellant who told him to hire people to kill the deceased. He also had independent witnesses to that effect and was also implicated by the first appellant in his statement and also by other witnesses. The first appellant's motor vehicle was also found in his possession.
- [28] Under cross – examination by the first respondent's legal representative, Mr Zepe, Ngculu did not dispute that when he was out on bail on serious charges of fraud and corruption in another case: (a) there is no case opened against the first appellant that he had threatened witnesses; (b), there is no evidence that the first appellant had evaded justice; (c) there is no evidence that the first appellant had threatened to kill any witness between 2012 and 2019,
- (d) the first appellant had been a good candidate after he was granted bail.
- [29] Whilst Ngculu testified that there was a statement made by one of the witnesses to the effect that he was threatened by the first appellant, she was at pains to concede that no complaint of threats against the first appellant was laid with the police for investigation. Consequently, no investigations had been instituted with regard to such threats. Ngculu could also not dispute that the deceased, as a 'whistle blower' did not testify in the Elliot fraud and corruption case against the backdrop of Ngculu's earlier testimony that the first appellant conspired with and hired someone to kill the deceased.
- [30] In relation to the case at hand, Ngculu testified under cross – examination that the first appellant was nowhere in the area in which the deceased was killed and did not kill the deceased himself but conspired with someone to do so. She further confirmed that her main witness went into hiding on his own and is not under any witness protection programme as a section 204 witness. She had not verified the threats against this witness but is investigating them. The second witness is safe under the witness protection programme. She also confirmed the existence of a hit list and also that it had not been compiled by the first appellant.
- [31] As regards the fourth appellant Ngculu in cross -examination by Mr Matoti stated that she could not be sure that the firearm found in the first appellant's motor vehicle driven by the fourth appellant was used, as if she was, she would not have sent it for ballistic tests. This concession is contrary to state's assertion during the fourth appellant's cross – examination that the investigating officer 'will come and testify that the weapon or murder weapon that was used to kill the deceased was found in your possession'. What also transpired during cross – examination is that despite the allegation that the fourth appellant was running away from the court, he was granted bail whilst charged for a schedule 6 offence at Qumbu and

this, it was contended during Ngculu's cross-examination, alone proves that he was a good candidate for bail as nothing had changed since his detention for this case. Ngculu further conceded in cross-examination that he had no knowledge of the fourth appellant interfering with state witnesses.

- [32] In a dramatic twist of events, Ngculu denied having told the court that the fourth appellant agreed to murder the deceased, saying that this she read from the first appellant's evidence. Bizarrely, Ngculu further stated that the fourth appellant did not refuse to murder the deceased but 'he was actually scared to carry out the murder himself. However, Ngculu later conceded that the fourth appellant did refuse to murder the deceased, 'according to his statement'.

The State's opposition to bail in the court a quo

- [33] Two main reasons were advanced by the State as to why bail should be denied to the first appellant and these are that, firstly, the first applicant if admitted on bail will commit another schedule 1 offence and secondly, the first appellant may intimidate state witnesses one of whom is on a witness protection programme Should he be admitted to bail 'he will go back, work and be a supervisor' to the witnesses.
- [34] It was further suggested by the state that the first appellant has not adduced any exceptional circumstances that are extra ordinary. Inexplicably, the evidence of the first appellant that he suffers from diabetes and high blood pressure was not gainsaid. Similarly, whilst the State submitted that the first appellant was receiving treatment in SADA prison, no evidence was led or even a suggestion made to that effect.
- [35] In relation to the fourth appellant, the state argued that there is nothing about his financial predicament and no evidence was presented to the effect that his continued detention will result in the financial downward spiral of his business. There is also nothing exceptional about his children, so it was submitted. There is no evidence adduced before court that his children are suffering. It was also the state's argument in the court a quo that if released, the fourth appellant will commit another schedule1 offence.

The judgment of the court a quo

- [36] In its judgment the court a quo correctly found that the offence with which the appellants were charged fell within the ambit of schedule 6 of the Act and that the provisions of section 60 (11)
- (a) were applicable. The learned magistrate correctly identified that as a result of the application of section 60 (11) (a) the appellants bore the onus to establish the existence of exceptional circumstances which in the interest of justice permit them to be released on bail. The learned magistrate referred to a plethora of cases to bolster his above proposition. The effort exerted by the learned magistrate in this regard is applaudable.

- [37] The learned magistrate appreciably quoted a passage in *S v Magotye*[2] in which he said that the learned Judge in that case said that exceptional circumstances is a concept incapable of exact definition. All the authorities are ad idem that the concept 'exceptional circumstance' has no precise definition. In *Magotye* the learned Judge said, and correctly so in my view, that the concept refers to unique, unusual, rare and peculiar circumstances. However, how unique is unique, how usual is unusual, how rare is rare and how peculiar is peculiar, remains a moot point. It is always shrouded in mystery and is in itself incapable of precise definition.
- [38] As a point of departure the learned magistrate left a spes that he will deal with the principles enunciated in *Magotye* later in his judgment 'as well as some of the submissions made by the defence'. In his quest to attach a proper meaning to the concept 'exceptional circumstances', the learned magistrate referred further to *S v Yanta*[3] in which is stated that exceptional circumstances could mean urgent, serious medical operation, terminal illness or lack of evidence

implicating the accused in the charge.

- [39] The learned magistrate further referred to *S v D, V & Others*[4] in which the court held that cumulatively the fact that the state case is subject to some doubt, the low risk pertaining to flight, the absence of likelihood of interference with state witnesses and the low risk of reoffending, constituted exceptional circumstances. As a last straw, the learned magistrate hit the nail in the bud when he referred to *S v Rudolph*[5] and said: "This, according to the Court, involved the balancing between the liberty, interest of the accused and the interest of the society in denying the accused bail and which will be resolved in favour of the denial of bail unless exceptional circumstances are shown by the accused to exist".

- [40] I cannot agree more with the learned magistrate that: "exceptional circumstances do not mean that they may be circumstances beyond and generally different from those enumerated in sub – section 60
- (4) to (9), in fact ordinary circumstances present to an exceptional degree may lead to a finding to release on bail is justified". It bears mention that circumstances referred to in section 60 (4) to
- (9) have to be taken into account for the purpose of determining whether the appellants should be admitted to bail.
- [41] In opposing bail, the state largely placed reliance on the say so of its only star witness, Brigadier Ngculu. In the same vein, in denying the appellants bail the learned magistrate took what Ngculu said or did not say into account. To the extent that the learned magistrate also might have gratuitously taken into account what Ngculu did not say, in this respect the learned magistrate shall have erred and misdirected

himself.

[42] In conclusion, the learned magistrate found that there were no exceptional circumstances which in the interest of justice permit the release of the appellants on bail.

Analysis

and evaluation

- [43] Apart from not taking the court in her confidence as regards where the murder was planned, when and with whom it was planned, and who else was present in the planning meeting, Ngculu herself denied that she ever said that the first appellant was involved in the planning of the murder. The confession the first appellant allegedly made did not sustain the state's case in this regard. Equally a mere saying that the first appellant planned to feign an alibi from the scene of crime at Cala and parade himself under CCTV cameras in Elliot in an attempt to sustain his alibi is a conjecture and speculation that is not supported by any evidence.
- [44] The confession allegedly made is in itself full of holes. Nothing is contained therein bolsters the contention that the first appellant admitted to having killed the deceased or having hired assassins to carry out the plot in as much as he never admitted to having promised to pay R20 000.00 to some people to carry out the murder. Where, how and with whom the plot to kill was hatched is of paramount significance.
- [45] There is no evidence that the first appellant breached his bail conditions in the case in which he was released on bail for having committed a schedule 6 offence.
- [46] Whilst the learned magistrate referred in his judgment to warrant of arrests which 'exist on all four accused', I did not understand the evidence of Ngculu to mean that the first appellant has a warrant issued against him. And so the learned magistrate's comment that Ngculu 'gave evidence that linked all the four applicants to this offence'. In my view Ngculu's evidence stands to be tested in court, more so in the light of the first appellant's alibi which has at this stage not been meaningfully gainsaid.
- [47] The first appellant's evidence that he never failed to appear in court in respect of his fraud and corruption trial was not gainsaid by the state. The distinction drawn by the learned magistrate as to which of the two offences, namely; the fraud and corruption charge and the murder charge he is facing in the court a quo is, with respect an unfortunate distinction that is not born by any merit as both theses offences are schedule 6 offences.

At page 9, line 19 of his judgment, the learned magistrate commented: "One must bear in mind that he is out on charges of fraud and corruption whereas here he is facing charge of murder". Similarly the learned magistrate's comment that "No evidence on the contrary was placed before me by the four applicants" is not well founded as the appellants strenuously denied involvement in the commission of the offences.

Submissions

by Counsel in this court

- [48] In his submission Mr Matanda, for the first appellant, contended that the court a quo should have found that the first appellant's continued detention will seriously prejudice his health which is corroborated by medical certificates annexed to his affidavit and this constitutes exceptional circumstances.

According to Mr Matanda the learned magistrate did not deal with the ill health of the first appellant at all in his judgment. When Mr Matanda was asked by the court if an accused is suffering from diabetes and high blood, he is immune from detention, Mr Matanda's response was that it must appear from the record that the issue was considered by the court. I agree with Mr Matanda that there is no reference at all in the court a quo's judgment to the first appellant's health condition.

- [49] Mr Matanda further referred the court to an assessment made by a doctor in frontier hospital where the first appellant was diagnosed of urinating blood consequent upon assault by police. It may very well be it that the first appellant was at the time of examination urinating blood but there is no evidence that at the time the bail application was made the first appellant was still urinating blood. When asked by the court whether this issue was still relevant, Mr Matanda responded that it might not be but it was at the time. I do not agree with Mr Matanda that this alone constitutes exceptional circumstances.
- [50] Mr Matanda in the first appellant's heads of arguments submitted further that even if the provisions of section 60 (11) had been invoked, it is not the duty of the bail court to make a provisional finding of guilt. I agree with Mr Matanda in this regard as it is trite that the refusal to admit an accused to bail should not be used as a form of anticipatory punishment. He further submitted the bail court should not go on a hunting spree for extra ordinary circumstances without taking into account that such factors as weakness of the state case, the low risk pertaining to flight, employment interest and constitute exceptional circumstances, the test being whether the first appellant will evade justice.
- [51] On behalf of the second appellant, Mr Tshitshi submitted that what linked the second appellant to this case was the motor vehicle that was found in his possession. According to Mr Tshitshi the fourth appellant gave an explanation regarding his possession of the first appellant's motor vehicle which was referred to as a getaway vehicle. The fourth appellant's explanation is that the first appellant is his cousin and that the first appellant needed a bakkie and they swapped vehicles. Mr Tshitshi argued further that what was said by the state to be linking the fourth appellant is the firearm that was allegedly found in the motor vehicle. He further submitted that when the forensic expert examined the cartridges and compared them to the cartridges fired from the firearm found at Mdantsane, the results were negative. He further submitted that the court a quo did not take into consideration the financial risk befalling the second appellant and the adverse effects thereof on his children.

- [52] On behalf of the State, Mr Joubert submitted that the appeal to this court is located in section 65 (4) of the Act the provisions whereof preclude this court from setting aside the magistrate's decision unless the court is satisfied that it is wrong in that the magistrate misdirected himself or herself in some material way in relation to the fact or law. I agree with Mr Joubert that this is the correct legal position.
- [53] According to Mr Joubert, the learned Magistrate dealt properly with all the relevant considerations and applicable principles. In his heads of argument, Mr Joubert further argued that the defence of alibi raised by the first appellant is not sustainable and when one evaluates the strength of the state case, the alibi defence disappears. He also submitted that the threats against the investigating officer should not be evaluated in isolation.

He further submitted that there is nothing unusual in the personal circumstances of the appellants. He further submitted that the first appellant's claim that his health is not good cannot be serious as he has been in custody for some time and it can be safely accepted that he is alive.

The

legal framework

- [54] The relevant statutory regime governing the release on bail of a person accused of having committed an offence referred to in Schedule 6 of the Act is section 60 (11) (a) of the Act. Section 60 (11)

- (a) provides that where an accused is charged with an offence referred to 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 interests of justice permit his or her release.

- [55] Section 65 (4) of the Supreme Court Act provides that a Court hearing an appeal against the refusal to release an applicant on bail will not set aside the

decision of the magistrate unless such Court is satisfied that the decision was wrong. The proper approach to be followed is set out in *S v Barber* as follows:

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

application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly,

although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would

be an unfair interference with the magistrate's exercise of 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 but exercised that discretion wrongly . . ."[6]

[56] The term, "exceptional circumstances", is not properly defined in the Act. In *S v Schietenkat* 1999 (2) SACR 51 (CC)[7], the Constitutional Court held that, "the inclusion of the requirement "exceptional circumstances" in Section 60 (11) (a) limits the right enshrined in Section 35 (1) (f) of the Constitution, it is a limitation which is reasonable and justifiable in terms of the Constitution in current circumstances.

[57] In *S v Jonas* 1998 (2) SACR 673 at (687 e-j) Horn AJ held that "exceptional circumstances" is established when an accused is able to adduce acceptable evidence

that the case against him is non-existent or subject to serious doubt. The learned Judge further said:

"The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence e.g he has a cast - iron alibi, this would likewise constitute an exceptional circumstance."

[58] The standard of proof required from the appellant to establish the existence of "exceptional circumstance" is on a balance of probabilities. See *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266 f-g. Once "exceptional circumstances" have been established by a bail applicant the enquiry must focus on the balance between the interests of the State as set out in Section 60

(4) of the Act on the one hand, and the appellant's interest in his personal freedom as set out in Section 60 (9) of the Act, on the other hand. Section 60 (4) provides:

"(4) The interests of justice do not permit the release from detention of an accused

Where one or more of the following grounds are established;

- (a) where there is a likelihood that the accused, if he or she is released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, or (b) where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or, (c) where there is a likelihood that the accused if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence, or

- (d) where there is likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, (e) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

[59] Section 60 (9) provides:

“(a) In considering the question in subsection 4 the court shall decide the matter by weighing the interest of justice against the rights of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account where applicable, the following factors; (b) the period for which the accused has already been in custody since his or her arrest;

- (c) the reason for the delay in the disposal or conclusion of the trial and any fault on part of the accused with regard to such delay. (d) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (e) the state of health of the accused; (f) any other factor which in the opinion of the court should be taken into account”.

[60] The issue in casu is whether the learned Magistrate misdirected himself in refusing the appellant bail and whether it is in the interest of

justice that the appellants be released on bail.

[61] Whilst in some cases previous convictions can be of a serious nature, I do not agree that previous convictions alone could be used by the court to punish an accused and deny him bail. This, in my view, is in keeping with a long held legal principle that refusal to grant bail to an accused should not be used as some form of anticipatory punishment.

[62] In considering whether it is in the interest of justice that the appellant be released on bail the court a quo should have balanced the interest of the appellant and those of the State. In *S v Hudson* 1996 (1) SACR 431 (W), Flemming DJP held:

“Considering the granting of bail involves, as is well known, a balancing of the interest of justice against the wishes of the accused. But this is, of course, not accurate. Those interests are not fully in opposition. It is also to the public good and part of public policy that a person should enjoy freedom of movement, of occupation, of association, e.t.c...”

[63] In *S v Stanfield* 1997 (1) SACR 221 (C) it was held that the court a quo had lost sight of the fact that denial of bail would be in the interest of justice only if one of the factors set out in section 60 (4) was probable. Where the facts in sections 60(4) and 60(9) of the CPA are relied upon in a bail application, they are relevant and cannot be ignored.

- [64] The learned Magistrate should have also taken into consideration the factors set out in section 60 (9) and this court must not lose sight of the period the appellants have spent in detention pending their trial.
- [65] Similarly, reliance by the State on the strength of its case could not have been considered in isolation. In *S v Van Wyk* 2005
- (1) SACR 41 (SCA) at paragraph (6), it was held that “the duty of the court in a bail application is to assess the prima facie strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a full-dress rehearsal for trial. The making of credibility findings of witnesses on the merits of the case against the accused is left to the trial court which is better placed to assess such witnesses. (See *S v Van Wyk* 2005
- (1) SACR 41 (SCA) at par [6])”.

Conclusion

- [66] I am not convinced that it is not in the interest of justice that the appellants be released on bail.
- [67] It seems to me that in its judgment, the court a quo did not properly deal with appellants’ personal circumstances, financial interest, possibility of the first appellant losing his job, possibility of the elder child of the first appellant dropping out of school, the fact that the appellants are not a flight risk and may not evade justice as well as the medical condition of the first appellant.
- [68] In my view, the learned magistrate did not bother balancing the interest of the appellants and those of the State or did he even bother affording the personal circumstances of the appellant due weight. The above is in my view a misdirection.

Order

- [66] In the result I grant the following order:
1. The first and fourth appellants’ appeal is upheld.
 2. The decision of the court below in refusing bail to the appellants is set aside and is substituted with the following:
 - 2.1 “Bail is granted to the first appellant in the amount of R20 000.00.
 - 2.2 “Bail is granted to the second appellant in the amount of R15 000.00.
 3. The granting of bail to the appellants is subject to the condition that they shall not interfere with state witnesses.

H. S. TONI

JUDGE OF THE HIGH COURT (ACTING)

Appearances

For the first appellant : Mr E.M. Matanda

Instructed by

: Keightely Sigadla Inc.

MTHATHA

For the fourth appellant : Mr S. Tshitshi

Instructed by

: Mkata Attorneys

For the state

: Mr JMK Joubert

Instructed by

: Deputy Director of Public Prosecutions

DATE HEARD : 28 October 2019

DATE RESERVED : 28 October 2019

DATE DELIVERED : 8 November 2019

[1] Act 51 OF 1977

[2] 1999

(1) SACR 223 (NC)

[3] 2000

(1) SACR 37 (Tkei)

[4] 2012

(2) SACR 492 (GNP

[5] 2010

(1) SACR 262 (SCA)

[6] 1979.

(4) SA 218 (D)

[7] At paragraph 77

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