

SOUTH AFRICA / JUDGMENT

Panayiotou v S (CA&R 06 /2015)

[2015] ZAECHGC 73 (28 July 2015)

[2015] ZAECHGC 73**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Goosen

CASE / FILE NUMBER

CA&R 06/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 06 /2015

DATE: 28 JULY 2015

In the matter between

CHRISTOPHORAS PANAYIOTOU.....Appellant

And

THE STATE.....Respondent

JUDGMENT

Date heard: 20 July 2015

Date delivered: 28 July 2015

GOOSEN, J.

- [1] This is an appeal against the refusal by the magistrate at Port Elizabeth to admit the appellant to bail. The appellant is charged, together with two co-accused, with conspiracy to commit murder; robbery; kidnapping and murder. The appellant is to be arraigned to stand trial in the High Court. The charges arise from the alleged abduction and subsequent murder of the appellant's wife on or about 21 April 2015. It is alleged that the appellant conspired with his co-accused to murder his wife and that the murder was carried out by one of the co-accused. The appellant made a formal bail application. The bail proceedings were adjudicated on the strength of affidavits filed by both the appellant and the prosecution. It is common cause that the appellant stands charged with an offence listed in

Schedule 6 to the Criminal Procedure Act, 51 of 1977 (hereinafter “the CPA”). Accordingly the appellant bore the onus at the bail hearing to establish exceptional circumstances which would render it in the interests of justice that he be admitted to bail.

Jurisdiction

- [2] The appeal was prosecuted before the Provincial Division of this Court rather than the Local Division at Port Elizabeth. At the commencement of the hearing the prosecution signaled its challenge to the jurisdiction of this Court. It was argued that the Provincial Division does not have jurisdiction to adjudicate the appeal on the basis that s 65(1)(c) of the CPA, read together with the Court Notice 1 of 2013, confers exclusive jurisdiction on a Local Division.
- [3] After hearing submissions from both parties on the issue I ruled that this Court does have jurisdiction to adjudicate the appeal. I indicated that my reasons for doing so would be set out in the judgment on the merits of the appeal in due course. Those reasons follow hereunder.

- [4] Section 65(1)(c) of the CPA provides that:

A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

- [5] The Court Notice designates the seats of the three Local Divisions within the Provincial Division as being at Port Elizabeth, Bhisho and Mthatha respectively.
- [6] The Joint Rules of Practice of the Eastern Cape (the “Joint Rules”) which took effect on 1 January 2008 regulate procedural matters for the Division. The Joint Rules refer to bail appeals in two rules. The first reference is in rule 18(d) which provides that no bail appeal shall be heard in a circuit local division. That rule is plainly of no relevance for present purposes. The second reference occurs in rule 19 which deals with the quorum of the Court in relation to specific types of cases. Rule 19(a) (iii) provides that one judge shall – unless otherwise decided – preside in a bail appeal. This rule gives expression to s 65(1) (b) which states that an appeal under the section may be heard by one judge. Both the section and the rule are permissive. No reference is made in either to the court in which a single judge may hear such a bail appeal.
- [7] The question which arises is whether s 65(1) (c) excludes the jurisdiction of the Provincial Division. The language of the subsection does not exclude such jurisdiction. Had it been intended that the Provincial Division’s jurisdiction be excluded the section would undoubtedly have stated as much in explicit terms.
- [8] To construe the section as limiting the jurisdiction of the Provincial Division would bring about absurd results when regard is had to the territorial jurisdiction of the Local Divisions in this Division. There are three local divisions within this Division with their respective seats at Mthatha, Bhisho and Port Elizabeth. East London is serviced by a circuit local

division. Each of the three local divisions has a defined territorial division. The total area covered by those three local divisions does not include that portion of the greater Eastern Cape Province which falls within the exclusive territory of the Provincial Division which has its seat at Grahamstown. The Provincial Division however has original territorial jurisdiction over the entire area of the Eastern

Cape Province (see *Thembani Wholesalers (Pty) Ltd v September and another*). The upshot of this is that a bail appeal which emanates

from a lower court which falls within the territory exclusively serviced by the Court with its seat at Grahamstown necessarily lies to the Provincial Division since there is no local division within which the area of jurisdiction of the lower court falls.

[9] I was not referred to any authority which supports the argument advanced by the prosecution nor was I able, in my research, to find such authority. The only reported judgment where the issue was touched on is *S v Ho* 1979 (3) SA 734 (W) where the court commented on section 65 as follows (at 737A):

An appeal under s 65 of Act 51 of 1977 is unusual in that it may be made in appropriate cases to this Local Division and not, as is normally the case, to the Provincial Division (see s 65(1)(c)). If the appeal is made to this Court, the fact must be stated in the notice of appeal...

[10] The passage is significant in two respects. Firstly it indicates that s 65(1) (c) creates an extraordinary jurisdiction which is unusual. Secondly it indicates that this extraordinary jurisdiction gives to the appellant a right of election whether to prosecute the appeal before the Local Division or the Provincial Division.

[11] This, in my view, is the correct interpretation of s 65(1) (c). Such interpretation accords with purpose for which s 65(1)

(c) was enacted, namely to cater for expeditious and convenient adjudication of bail appeals. Bail proceedings are by their nature urgent proceedings which concern questions of the liberty interest of a person who is presumed to be innocent until his or her guilt is proved in a court of law. A permissive rather than peremptory interpretation also accords with a more general approach to interpreting provisions which purport to oust a court's jurisdiction. No logical or rational purpose could be served – as the discussion of the territorial jurisdiction of courts in this Division aptly demonstrates – by conferring exclusive jurisdiction in bail appeals on Local Divisions of the High Court.

[12] For these reasons I found that this Court has the jurisdiction to adjudicate this appeal.

[13] Following the ruling on jurisdiction the appellant made a formal application to adduce additional evidence before the appeal court. The application was opposed by the respondent, although no opposing affidavits were filed. After hearing argument on the issue, I dismissed the application. My reasons for doing so are set out hereunder.

Leave to adduce further evidence

- [14] The application consisted of two parts. In paragraph 1 of the notice of motion the appellant sought an order directing the respondent to make available the witness statements of Coutts and Kapp. It was indicated that once these statements were furnished the appellant would consider whether or not to seek to have them incorporated in the record of the bail proceedings for consideration on appeal. The second part of the application was for an order to introduce into the record two documents, namely a photograph of Luthando Siyoli (who is presently a co-accused) who, according to the respondent, will testify as a section 204 witness in the criminal trial. The photograph, taken from video footage recorded at the time of his arrest, was alleged to indicate that he was free of any injuries. The other document was an extract of the Occurrence Book kept at Fort Beaufort police station where Siyoli was detained sometime after his arrest. The entry records that he had “a swollen eye before arrest”.
- [15] The argument advanced by the appellant was that the latter two documents go to show that Siyoli must have suffered some form of an as yet unexplained assault subsequent to his arrest. This, together with the common cause facts, namely that he allegedly made a confession which the respondent has indicated will not be relied on raises significant concern about the admissibility and reliability of the evidence that may eventually be presented by him at the trial. Accordingly, so the argument was developed, the finding that the state has a strong case against the appellant is open to doubt. It was submitted that in the context of the bail hearing reception of the evidence would be in the interests of justice and should therefore be allowed.
- [16] A similar argument was advanced in respect of the two witness statements sought by the appellant. It was submitted that the respondent had, in response to questions raised by the magistrate, made the averment that Coutts and Kapp would provide evidence implicating the appellant in respect of the motive for the murder of the deceased. In the light of the fact, so it was submitted, that the magistrate had made a finding to this effect, it was essential that the veracity of the assertion be examined. If it was established that the statements contained no such allegations, then the magistrate’s finding would be demonstrably wrong and,
- furthermore, doubt would be cast on the other assurances regarding the strength of the state case upon which the magistrate also
- apparently relied.
- [17] In support of the application to introduce the photograph and occurrence book entry into the record, it was submitted that the new facts were only discovered after the magistrate’s judgment refusing bail had been given. In regard to the “discovery” of the statements, it was submitted that this court would be best placed to decide upon the relevance and importance of their discovery.

[18] The respondent opposed the application on two grounds. Firstly, it was argued that the appellant had failed to provide any explanation as to why this evidence was not adduced or sought to be introduced at the time of the bail hearing. The issue in respect of the alleged motive and the nature of the evidence available to the respondent was alive throughout the bail hearing, as was the reliability of the evidence of Siyoli. It was submitted that the application was belatedly brought as a speculative “fishing expedition”. In any event, it was submitted, the requirements set out in s 316 of the CPA, assuming it applies, had not been met. The second ground was that the introduction of new facts on appeal is specifically precluded by s 65 (2) of the CPA.

[19] I shall deal with the latter issue first. Section 65 deals with appeals to a superior court against the refusal by a lower court to admit an accused person to bail. Subsection (2) provides that:

An appeal shall not lie in respect of new facts which arise or discovered after the decision against which the appeal is brought, unless such new facts of first placed before the magistrate will regional magistrate, against whose decision the appeal is brought, and such magistrate or regional magistrate gives a decision against the accused on such new facts.

[20] In *S v Ho* (supra) the court dealt with an appeal against a decision by a magistrate relating to the amount fixed for bail. The essence of the case on appeal was that the magistrate had fixed an amount of bail without having heard evidence or having conducted an enquiry to determine whether the accused could afford the amount determined. It was sought to introduce facts relevant to this aspect. In dealing with the basis upon which a bail appeal is adjudicated, the court (at 737E-H) said the following:

I turn now to the appeal itself. The first point to be noted is that this is an appeal and not, as it was under the 1917 Act, an application. The case, therefore, has to be decided upon the material appearing on the record, including the magistrate’s reasons, either given at the time or furnished in terms of s 65 (3). There is no provision for furnishing additional information to this Court. On the contrary s 65 (2) provides:

[The quotation of the sub-section is omitted]

It is therefore incumbent upon the appellant or his legal representative to place the relevant facts fully before the magistrate when the application for bail is made or, if any such facts are not known to such legal representative, to take steps under ss

(2) when they become known to him. It is not competent to lay them before the appeal court by way of affidavit, nor is it proper to attempt to introduce them by way of statements from the Bar.

- [21] The court went on, in the circumstances relevant to that case, to state (at 739F) that when new facts had come to light after the amount of bail was fixed that the procedures set out in s 65 (2) ought to have been used to bring the new facts to the attention of the court and to require a fresh decision on such facts.
- [22] It was submitted by the appellant's counsel, albeit without conviction, that the situation in the present matter does not, strictly, involve new facts. Rather, the additional information relates to issues relevant to the basis of the magistrate's reasoning. The submission is a tortured one. There can be no doubt that the evidential material sought to be introduced by way of the documents would disclose facts which were not before the magistrate. The appellant seeks to introduce these new facts in order to strengthen its submission, in the appeal, that the finding that the state has a strong case is wrong. It is precisely this situation that s 65 (2) addresses.
- [23] Section 316 (5) deals with the procedure by which further evidence is introduced at the stage at which leave to appeal is sought in a criminal matter. It also sets out the factors relevant to allowing such further evidence to be introduced. Leave to appeal is not required in the case of an appeal against the refusal of bail (see *Mohammed v S* [1999] 4 All SA 533 (C) at 536). The procedure set out in s 316 (5) therefore does not find easy application in the context of a bail hearing. It is however not necessary to whether s 316(5) applies at all. It is also not necessary to consider the factors relevant to the introduction of new evidence on appeal as enumerated in s 316. That is so because s 65
- (2) is peremptory. New facts cannot be adduced in a bail appeal. As for the procedure by which new facts are to be introduced when a bail appeal is to be prosecuted, it is necessary to point out only this: that it is not competent to seek to introduce such new facts or evidence at the stage of the appeal. The new evidence must be adduced before the court that heard the bail application.
- [24] It is necessary to conclude this aspect with some remarks relating to the "discovery" of the statements by Coutts and Kapp since this relief, so I was informed, was sought before this court by reason of it being best placed to determine the relevance of the documents. The "discovery" order was of course integrally tied to the prosecution of the appeal. It was suggested that the statements would either support the magistrate's conclusions or will not. It was suggested that, in
- the event that the appellant did not seek to introduce them once discovered, this court could properly draw an adverse inference
- against the appellant. This, in my view, illustrates that the substantive effect of granting such an order would be to introduce
- new facts on appeal. For the reasons already advanced such procedure is not competent. I therefore dismissed the application.

The merits of the appeal

[25] Section 65 (4) of the CPA 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.

[26] In *S v Barber* 1979 (4) SA 218 (D) Hefer J said (at 220 E – H.):

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 review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its 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.

[27] This approach has been approved in a number of decisions. In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected himself or herself in some material way in relation to either fact or law (see *S v Ali* 2011 (1) SACR 34 (E) at para 14; cf. also *S v M* 2007 (2) SACR 133 (E)). If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the absence of a finding that the magistrate misdirected him or herself the appeal must fail (cf. *S v Porthen and others* 2004 (2) SACR 242 (C) at par [11]).

[28] The appellant advanced several grounds upon which it was submitted that the magistrate had erred in finding that he had not established exceptional circumstances to warrant his release on bail. The alleged misdirections will be dealt with hereunder. It was submitted that in the event that this court finds that one or more of the misdirections or errors is established bail could be considered afresh.

Reliance on statements from the bar

[29] The first of these related to the assertion that the magistrate had strayed beyond the boundaries of the evidence adduced by way of affidavits that served before her and had relied upon statements by counsel in response to questions raised in terms of s 60 (3) of the CPA. In this regard it was submitted that the magistrate had accepted assurances made about the evidence available to the state and had, on the strength thereof come to the conclusion that the state's case was strong. In particular it was submitted that the magistrate had relied on the assertion by the prosecutor that the witnesses Coutts and Kapp would implicate the

appellant in relation to the motive for the murder. It was submitted that the magistrate had made a finding to this effect when there was no evidence to substantiate the finding.

[30] The record indicates that the magistrate, before giving her ruling on the bail application, addressed several questions to both the prosecutor and appellant's counsel in terms of s 60 (3). The transcript records a lengthy exchange on a variety of issues which had been debated in the argument addressed to the magistrate at the conclusion of the application. It is worth noting here that the appeal record consisted not only of the affidavits filed by the parties and the magistrate's

reasons.

It also included a transcription of the affidavits as they were read into the record and the arguments presented by counsel. During the course of the lengthy exchanges the issue of the alleged motive for the murders was raised. An application was made by defence

counsel, in terms of s 60 (14) to gain access to certain statements which were alleged to be relevant and, after a further debate (part of which is recorded could not be transcribed because the recording device stopped working), the application was withdrawn.

[31] What follows this is a statement by the magistrate clarifying the basis upon she sought clarity regarding the evidence as to motive. She says the following (at p 458 of the Record):

All I was trying to do and the questions with regards to the motive is, and I think that I have got the clarity and from the affidavit, that is all. The last statement that he makes with regards to that she was spending too much money is contained in the investigating officer's affidavit. So your client is not being prejudiced in any sense. It is already in 'B1', at paragraph 53.

[32] The paragraphs in the investigating officer's affidavit are not numbered. The reference to "paragraph 53" is where the investigating officer responds to the paragraph of that number in the applicant's affidavit. There the investigating officer indeed outlines the alleged motive. A careful reading of the investigating officer's affidavit, which could undoubtedly have been drafted in clearer terms, indicates that the source of such allegations as the prosecution considered relevant to the asserted motive are the witnesses Coutts and Kapp. Reference is made in the affidavit to the 'mistress of the applicant' and 'her best friend'. The prosecutor's reference to witnesses Coutts and Kapp when asked by the magistrate is therefore founded on the evidence that was before the magistrate. He made it clear that their evidence related

to motive and pointed out that he used the "implicating" only with regard to the appellant's motive.

[33] In her reasons for judgment the magistrate refers to Coutts and Kapp and the nature of their evidence only in the context of considering the issue of the likelihood that the appellant will interfere with witnesses. She does rely upon the fact that their evidence will apparently relate to motive in order to find that the prosecution case is strong.

- [34] As to the general submission that the magistrate went outside of the ambit of the evidence to make findings as to the strength of the state case, there is no merit in the submission. I shall deal with the evidence presented regarding the nature of the state case against the appellant and the magistrate's approach hereunder when dealing with the factors which were taken into account in deciding whether there was a likelihood that the appellant would evade trial.

The conditions of detention

- [35] The appellant's argument in relation to the conditions of detention in St Albans prison was that the magistrate had failed to attach sufficient weight to the fact that these conditions were in breach of the appellant's rights to dignity. It was argued that evidence establishing these conditions could not be ignored and that the magistrate had erred in failing to take the evidence into account as a factor to be weighed in deciding whether bail should be granted.
- [36] The magistrate was severely criticized for her comment that "prisons are never intended to be a holiday away from home" as indicating a disregard for the appellant's constitutional rights. It was submitted in argument that this was "a callous" statement. The remark is certainly unfortunate. It suggests that the concerns about the conditions in prison are inconsequential. However, a careful reading of the magistrate's reasoning in regard to the appellants' case based upon the conditions of detention, indicates without doubt that the magistrate accepted that the conditions of detention may give rise to violations of the rights to health, dignity and safety of inmates.
- [37] The magistrate specifically took judicial notice of the overcrowding in prisons and its effect. This is in line with the judgment of Roberson AJ (as she then was) in *S v Jacobs* 2011 (1) SACR 490 (E), a judgment upon which the appellant relied in the bail application and in this appeal.
- [38] In *Jacobs* the issue was whether the accused could afford the amount of bail that had been set. The court was concerned with the issue of affordability of bail in relation to an accused's right to liberty and it was in that context that the court had regard to the effect of overcrowding in prison. The court noted that section 63A of the CPA had been introduced to provide for a procedure whereby an accused who had been admitted to bail but could not afford to pay the bail could be released in circumstances where overcrowding "constitutes a material and imminent threat to human dignity, physical health and safety of an accused". The facts of *Jacobs* are wholly distinguishable from the present matter. The magistrate in any event cannot be criticized for not considering that conditions of detention may constitute a factor to be weighed in cumulatively deciding whether exceptional circumstances have been established to warrant release on bail in a case such as the present, when that is precisely what she found. The magistrate went further in this regard and considered the length of time that the appellant may be incarcerated pending trial if bail were to be refused. This, she observed with reference to *S v DV and others* 2012 (2) SACR 492 (GNP), is also a factor which may be weighed cumulatively in determining whether exceptional circumstances exist. She found that in the circumstances of this case it would

not.

[39] In my view no misdirection either of fact or law is established in relation to the magistrate's approach to the issue of the conditions of detention. The further question as to whether the magistrate attached insufficient weight to this factor must also be answered in the negative.

[40] The appellant argued that the magistrate had brushed aside the deplorable conditions in St Albans and ignored the judgment of Roberson J in Jacobs. The argument is without merit. As already indicated it is clear from a reading of the magistrate's judgment that she considered the principle which was accepted in Jacobs and found that the conditions of detention serve as a factor to be weighed in the scales to determine whether exceptional circumstances exist. The fact that the magistrate did not cite the judgment is of no consequence. Jacobs in any event does not constitute authority for the proposition that deplorable conditions

of detention necessarily favour an accused persons release on bail. The approach which was set out in *S v Van Wyk* 2005 (1) SACR 41 (SCA), namely that release on bail is not the remedy for the failures of correctional services to ensure detention in conditions of humanity.

[41] In the circumstances the magistrate's judgment in relation to this aspect cannot be faulted. A final aspect of the argument requires comment. It was submitted that the appellant was being detained in "solitary confinement" and that this was a form of punishment imposed on a person who is presumed innocent until the contrary is proved at trial. The basis for the argument that he is being detained in "solitary confinement" is the fact that the appellant is, according to the Head of the Prison afforded one hour of exercise per day. The conclusion which was urged upon me was that this meant he was locked up in a cell for 23 hours per day.

[42] The appellant's case in his founding affidavit dealt at considerable length with the conditions that pertain in the communal cells where he was initially detained. However at the time of the bail application he had already been moved to a single cell because of concerns about his safety. He asserted that this amounts to solitary confinement. However no evidence was presented to substantiate this assertion. There is for instance no evidence that he has no contact with other inmates; that he has no communication with other inmates or prison officials; there is no evidence regarding restrictions on visits of family or legal representatives. The assertion that accommodation in a single cell therefore amounts to "solitary confinement" is unsubstantiated and amounts, in my view, to an emotive argument. Even if it is accepted that the exercise period is not in accordance with appropriate international and constitutional standards of detention, the remedy, as noted in *Van Wyk*, is not the release on bail but an appropriate challenge to the department of correctional services.

Finding that the state's case is strong

- [43] A substantial portion of the appellant's argument on appeal concerned the magistrate's findings regarding the strength of the prosecution case against the appellant.
- [44] It was argued that the magistrate had misdirected herself in regard to the test to be applied when an applicant for bail challenges the strength of the state case against him or her. It was submitted that the magistrate had incorrectly regarded it as necessary for the appellant to show that the case against him was "exceptionally weak". It was also argued that the magistrate had incorrectly come to the conclusion that the case against the appellant was strong.
- [45] It was submitted that there is in fact considerable doubt about the strength of the prosecution case against the appellant. This arises from the fact that it is not clear what the status of the witness, Siyoli, would be at trial namely whether he would appear as a co-accused or as a prosecution witness warned in terms of s 204 of the CPA. It was also argued that there was doubt about the admissibility of the evidence that the Siyoli may be able to give against the appellant. In this regard the indication

by the prosecutor that the state would not be relying upon a confession allegedly made by him suggested that the confession may

not have been freely and voluntarily made. If that is so, so the argument went, significant doubt arises as to the admissibility of the evidence and the reliability of his evidence. Since, so it was argued, the state's case was fundamentally dependent upon his evidence, it cannot be said that the case against the appellant is a strong one. To the extent that the magistrate found this she was, so it was submitted, wrong.

- [46] In similar vein it was submitted that the video and audio recording which the prosecution had tendered in evidence in the bail proceedings, was also subject to an admissibility challenge and, in any event, would be adequately explained at trial. The argument was that the appellant, had allegedly been instructed by Eksteen, a police officer close to the family of the deceased, to meet with Siyoli in order to obtain information from him.
- [47] I shall return hereunder to the magistrate's assessment of the nature of the onus which rests upon an accused in circumstances where the strength of the state case is an issue. It is however necessary first to evaluate the nature of the evidence that was presented by the prosecution at the bail hearing relating to the strength of the state case against the appellant and, in that context, to assess the findings made by the magistrate to determine whether there is indeed any misdirection in relation to these

facts.

- [48] It should be noted at the outset that the appellant did not, in his founding affidavit set out to challenge the strength of the state case against him. To the contrary, he specifically indicated that no comment can be given on the strength or otherwise of the state case. He stated that he does not contend that the prosecution case against him is weak. The

prosecution however, in opposing the granting of bail, sought to demonstrate that its case against the appellant was reasonably strong. It did so in the context of contending that the appellant was a flight risk and that there was a likelihood that he would interfere with the investigation or witnesses for the prosecution.

- [49] The essential allegations of fact which the prosecution intends to prove at trial were set out in the affidavit of the investigating officer, Swanepoel. These allegations and the nature of the evidence available to substantiate them were summarised in detail in the magistrate's reasons. They were not seriously challenged by the appellant. I need only describe this evidence briefly. The state indicated that it was in possession of an affidavit provided by legal representatives, acting on behalf of Siyoli, the alleged co-conspirator who organised and arranged for the person who ultimately committed the murder. The allegation is made that Siyoli's evidence will confirm that the conspiracy originated in September 2014; that arrangements had been made for the murder to take place on a prior occasion; that a substantial amount of money was paid over to him; that this occurred in the presence of his girlfriend; and that he retained an amount of R30 000.00.
- [50] The affidavit of the investigating officer, indicates that evidence is to be presented at trial by the girlfriend of Siyoli confirming the payment of a large sum of money by appellant to Siyoli in her presence; that an amount of R30 000.00 was found in the position of Siyoli at the time of his arrest. His affidavit, as already indicated deals with the alleged motive of the murder.
- [51] The investigating officer also dealt with the fact that evidence would be presented in respect of telephone calls made between the appellant and Siyoli; Siyoli and the present accused 3 at particular stages relevant to the planning and execution of the murder. Evidence would be presented regarding the physical location of cellphones utilized by appellant, Siyoli and accused 3. This evidence would establish the presence of particular cellphones at the same location a certain times relevant to the commission of the offences. This was referred to as "cellphone mapping", not to be confused with the use of the same term in discussions between counsel and the magistrate in relation to the monitoring of the appellant should he be released on bail.
- [52] The magistrate, was alive to all of the components of the prosecution case set out above as well the transcript of the video and audio recordings of a meeting that occurred between Siyoli and the appellant which occurred on 29 April
2015. The evidence of the investigating officer was that appellant and Siyoli are clearly visible on the video footage. The magistrate considered the content of the transcript of the conversation between appellant and Siyoli – evidence which was properly before her in the bail proceedings – in assessing the strength of the state case on the one hand and in assessing the allegation by the

prosecution that there was a likelihood that the appellant, based on his prior conduct, would interfere with the investigation or with witnesses.

- [53] The only basis upon which it was argued that there is some doubt about the strength of the state case was in relation to the reliability of the Siyoli as a witness. That issue, of course, is a matter that no doubt will be canvassed fully at the criminal trial. It is after all, at that point that critical questions of the admissibility and reliability of evidence will be tested. What the court is called upon to consider, in a bail application, is the nature of the evidence that is available to the prosecution and, absent a challenge in the bail proceedings to the admissibility or reliability of that evidence, the court will accept the evidence. It is upon this acceptance that the court decides whether the case is strong or weak.
- [54] In this instance there was no admissibility challenge founded upon convincing evidence calling into question the admission of Siyoli's evidence or the evidence of the meeting that occurred between him and the appellant.
- [55] It was argued that the magistrate had overemphasized the strength of the state's case; that she elevated the consideration of the strength of the state case "into the be all and end all" of the matter. I disagree. The magistrate considered the strength of the state case against the appellant as but one of the factors to be considered when deciding whether there was a likelihood that the appellant would evade trial, as she was required to do and she was cognisant of the role that the assessment of the strength of the state's case plays in the overall decision whether exceptional circumstances have been shown to exist. This approach is correct. The fact that the magistrate found that there is a reasonable or even a strong (she uses both terms)

prima facie case against the appellant also cannot be criticized. The evidence that was presented by the prosecution was not that the case "would stand or fall" on the admissibility of the evidence off Siyoli, as was suggested. The state's case comprises a number of elements. The prosecution bears no onus in a bail application to establish that it has a strong case against the accused person. Nor does the prosecution bear an onus to disprove the existence of exceptional circumstances (cf. *S v Mpulampula* 2007 (2) SACR 133 (E) at 135h).

- [56] There is no obligation on the part of the applicant for bail to challenge the strength of the state case. It is not necessary to do so in order to establish exceptional circumstances. Exceptional circumstances warranting the release of an applicant on bail can be established without challenging the strength of the state case (*S v Mathebula* 2010 (1) SACR 55 (SCA) at para 12). However, if an accused person challenges the strength of the state case against him in the bail proceedings then in that event the challenge attracts a burden of proof to show that there is a real likelihood that he will be acquitted at trial (*S v Mathebula* (supra))
- [57] In this instance the applicant appellant did indeed set out to challenge the strength of the state case. He did so, not in his founding affidavit but in his reply to the allegations that the state had made regarding the strength of the case against him. His case for a finding that exceptional circumstances were present entitling him to be released on bail inter alia relied

on the assertion that the state case was not as strong as was being asserted. His case, as has already been indicated, was also that his personal circumstances together with the fact that he would not evade trial and that he would not interfere witnesses, established exceptional circumstances as required. However in order to enable the court to come to the conclusion that the state case was weak or that he was likely to be acquitted, he was required to adduce convincing evidence to establish this (cf. *S v Mpulampula* (supra) at 135h; *S v Mathebula* (supra)). This he did not do. And the magistrate quite correctly found that he did not do so. Accordingly, the magistrate was quite correct to consider as one of the factors in determining whether exceptional circumstances exist, the fact that the prosecution has a reasonably strong case. That factor, of course, is also relevant in the overall assessment of whether the appellant poses a flight risk and whether there is a real likelihood that he will evade his trial. In her judgment the magistrate noted that the likely consequence of a conviction was that the appellant would face potential life imprisonment, given the nature of the offence. This she found would serve as an inducement to evade trial. In so finding the magistrate did not misdirect herself in any manner.

Likelihood of interference with evidence or witnesses

- [58] The prosecution case in the bail hearing was that there existed a real likelihood that the appellant would interfere with witnesses or tamper with evidence. This was based upon evidence of past conduct of the appellant contained in the transcript of the conversation between Siyoli and the appellant. It was also based on the evidence of the investigating officer, subsequently admitted by the appellant, that appellant had deleted all data from both his and Coutts' cell phones prior to 25 or 26 April 2015.
- [59] The transcript of the meeting with Siyoli contains a number unequivocal statements in which the appellant is recorded as telling Siyoli to destroy a cell phone and sim card; that he should leave town and effectively hide from the police. It also contains statements that the appellant would misinform the police investigators about the whereabouts of Siyoli in order to enable him to avoid further questioning. It is not necessary to repeat the detail of that evidence here.
- [60] It was not suggested, in argument, that these statements do not point to a stated intention to destroy any evidence of telephonic contact between Siyoli and the appellant. It was suggested however that the conversation would be placed in its proper context at the trial.
- [61] Insofar as the appellant's admitted destruction of information on his and Coutts' telephones is concerned, the appellant's case was that only evidence of their relationship had been removed. The prosecution evidence however was that the cellphones contained no information or data at all prior to a certain date which was a date shortly after the body of the deceased had been discovered. Although the prosecution had sought to suggest that the destruction of the information may have destroyed evidence which was relevant to another aspect, namely the appellant's knowledge of the existence of a Cypriot passport, the magistrate rejected the argument.

- [62] In considering whether a likelihood existed that the appellant would interfere with witness or with evidence the magistrate was mindful that it was necessary that factual basis must be established. She took into account that past conduct is clearly relevant (see *S v Hlongwa* 1979 (4) SA 112 (D) at 113H) and that there must be a reasonable possibility of such interference (*S v Bennet* 1976 (3) SA 652 (C)). The magistrate's approach to the determination of the issue involves no error or misdirection.
- [63] In coming to the conclusion that the evidence establishes a real risk that the appellant, if released on bail, will interfere with witnesses or evidence a number of issues were considered, in addition to the evidence as to the appellant's prior conduct, as discussed above. These included his long standing relationship with Coutts; the fact that Kapp was privy to that relationship. The magistrate concluded that, notwithstanding the indication that they had already given statements to the police that they would be susceptible to influence by the appellant. Relevant to this finding was the view that the magistrate had taken of the destruction of information on the cellular telephones. Although the magistrate was not prepared to find that a specific class of evidence may have been destroyed she nevertheless found that the appellant's explanation was open to some doubt.
- [64] Having regard to the range of factors considered by the magistrate I do not consider that she misdirected herself in finding that there was a likelihood that the appellant would tamper with evidence or interfere with witnesses should he be released on bail.

Likelihood that the appellant would evade trial

- [65] The magistrate's finding that there was a likelihood that the appellant, if released on bail, would evade trial was challenged on several grounds. In addition to the submissions regarding the findings in respect of the strength of the state case with which I have dealt earlier in this judgment, it was submitted that the magistrate had erred in finding that the appellant was financially over-committed. It was also submitted that she had erred in not accepting the appellant's explanation for failing to disclose his Cypriot citizenship and had erred in her approach to the imposition of conditions of bail which would alleviate the risk of flight.
- [66] The strength of the state case is a factor relevant to the determination of this issue. As already indicated it was taken into account is assessing the likely consequences that would flow from a conviction and, therefore as possible inducement not to stand trial. No error was committed in this regard and nothing further need be said about this aspect.
- [67] The other factors which were taken into account fell within the broad category of the personal circumstances of the appellant, in particular his business interests and the status of his financial affairs and the effect that continued detention would have on these interests.
- [68] The magistrate's finding that the appellant is over-committed financially, and that he has more debt than assets is based on the fact that the statement of assets and liabilities (CP1) attached to the replying affidavit of appellant was not explained in the evidence. She

incorrectly states that the statement of assets and liabilities was attached to the affidavit of Van den Berg. CP1 was prepared by Van den Berg who is also the accountant of Elskamark (Pty) Ltd which trades as Infinity Cocktail Bar, a business operated by appellant. Van den Berg's affidavit was submitted with the founding affidavit. Nothing turns on this. It is correct that the statement of assets and liabilities is not explained. It was put up as being apparently being self-explanatory since it indicates a net asset value in excess of R3 million.

[69] The magistrate was quite correct in her finding that the affidavit of Van den Berg (exhibit A5) creates the impression that the appellant is the sole owner of the Infinity Cocktail Bar. No reference is made in the affidavit to the fact that he only owns 74% of the business. The appellant referred to this business in his founding affidavit as the Infinity Pub and Grub. He declared it as an asset and stated that the business pays him an amount of R20 000.00 per month "which is immediately set off against the loan account which I used to build up the business and purchase stock". The "loan account" to which he refers is not explained. He states that his father in law assisted him "in building the business up". His assertion of the

value of the Infinity Pub as an asset suggests that approximately R750 000 was invested in Infinity Pub.

[70] According to van den Berg's affidavit the net income in the Infinity business is R20 000 to R25 000 per month which corresponds with what the appellant says he is paid each month. It is not explained why he should receive the total net income in the business when he is only a 74% shareholder.

[71] In CP 1 the asset value of the appellant's share of the Infinity business is reflected as an amount of R810 394.00. In addition it reflects a current asset in the form of a loan to Infinity in an amount of R716 454.00. In the light of the approximate value of the business by the appellant which is confirmed on oath by Van den Berg the figures reflected in CP1 are, at best obscure. CP1 is not confirmed under oath by the author of the document. Its content is unexplained and open to some doubt in the light of other evidence relating to the financial affairs of the appellant. Thus, for example, a business declared to be an asset in his founding affidavit, Hi Net Lounge, which generates a monthly income for the appellant is not reflected at all in CP1.

[72] In my view little or no weight can be attached to CP1. The magistrate assessed the weight of the evidence tendered by the appellant in the light of all of the evidence relating to the appellant's financial affairs. She was correct to do. She considered also the evidence relating to the appellant's apparent lack of cash resources, as evidenced by the need to borrow funds from family members to pay transfer costs on the property purchased. All of this was weighed in coming to the conclusion that the appellant is financially over-committed. I do not consider that she was incorrect in coming to this conclusion.

[73] In respect of the likely effect that continued detention would have on the financial and business interests of the appellant, the magistrate took into account the possible period of detention. She accepted that it was likely that his financial interests would suffer. She did not

however accept that the appellant's detention would result in the collapse the businesses he was involved in. She considered it to be highly unlikely that the 90% shareholders in the Ok Grocer business would not take steps to ensure that the business was properly managed in the absence of the appellant. She also did not consider it probable that the same would

occur in relation to his other business interests. These findings regarding the probabilities are, in my view, unassailable.

[74] The magistrate's findings regarding the appellant's financial affairs and the effect that detention would have on his business interest were in any event only one aspect of the set of considerations relevant to her finding that there was a risk that the appellant would evade trial. One of the other factors was the fact that the appellant had not disclosed that he held dual citizenship and that he had applied for a Cypriot passport. No mention was made of any of these facts in his founding

affidavit. These facts only emerged as a result of investigations undertaken by the investigating officer. It transpired that a Cypriot passport had been issued to the appellant on 5 March 2015, although the appellant had not taken possession of it.

[75] The appellant's explanation for his non-disclosure was that his attorney, Mr. Griebenouw had considered these facts irrelevant to the bail application. He stated in his replying affidavit that he had told his attorney in consultation that he was also a Cypriot citizen; that he held a Cypriot identity document and that he had applied sometime in 2013 for a Cypriot passport. According to him, because he was not in possession of a Cypriot passport, he was advised that it was unnecessary to disclose these facts.

[76] His attorney, Griebenouw, deposed to an affidavit in the founding papers in relation to various matters including the appellant's conditions of detention which formed a basis for his application. No affidavit was filed by Griebenouw confirming the facts relating to the Cypriot citizenship issue when the replying affidavit was submitted. Why this was not done is unexplained. It is extraordinary that on such an important matter which had assumed significant proportions in the bail proceedings, Griebenouw should not file an affidavit. The magistrate was correct to find it extraordinary that Griebenouw could have considered such evidence to be irrelevant to the bail proceedings. It was submitted by the state that the failure to disclose the Cypriot citizenship must be seen in the light of the fact that all of the allegations made in the founding affidavit were directed to support the assertion that the appellant had nowhere to go and that he therefore posed no flight risk. As I understood it was suggested that the non-disclosure was deliberate. The magistrate did not make such a finding and such finding cannot be made on the evidence. That does not mean of course that the non-disclosure was not correctly taken into account in the overall assessment of the risk that the appellant would evade trial.

[77] In argument before me this issue was only briefly referred to by appellant's counsel with the focus of the argument being directed to criticism of the fact that the appellant's prior travel history was considered to be of relevance and to the "recklessness" of the investigating officer who had incorrectly formed the view that the Cypriot passport had been applied for in order to serve as a means to flee. This statement was, without doubt, ill-considered and not supported by the

facts

as they emerged. The magistrate did not take it into account.

[78] In my view, the magistrate's finding – having regard to all of the relevant factors addressed in the evidence – that there was a real risk that the appellant would not stand trial if released on bail was not tainted by error or misdirection. It must therefore stand as correct.

[79] In dealing with the question whether appropriate bail conditions could be imposed to alleviate the risk of evading trial the magistrate concluded that the conditions suggested, namely handing in of passports and travel documents; notification of the authorities at border posts, so-called red flagging would not serve to secure the attendance of the appellant at trial. She relied on *S v Vermaas* 1996 (1) SACR 528 (T). I am unable to find that she was wrong in coming to this conclusion.

[80] It was submitted that the magistrate had erred in adopting the view that the amount of R50 000.00 as bail, which had been indicated by his counsel in response to a question from the magistrate, was too little and that the appellant would be prepared to walk away from such an amount. It is indeed so that considered that an amount of R50 000 would be unlikely to serve as deterrent. This view of the effect of the posting of an amount in that order must however be seen against the magistrate's finding that there was risk of flight even though there were extensive family and business ties to this country.

Conclusion

[81] As was indicated earlier in the judgment appellant's counsel accepted that in the absence of a material misdirection or error by the magistrate having the effect that the decision of the magistrate to refuse bail is wrong, the appeal cannot succeed. This is in accordance with the test to be applied on appeal (see *S v Barber* (supra); *S v Porthen and others* (supra)).

[82] As the discussion of the several grounds advanced on appeal indicates above I am unable to find that the magistrate erred or misdirected herself in relation to those issues and the findings made.

[83] The magistrate's judgment contains a full discussion of the nature of the onus which rest upon an accused person charged with a Schedule 6 offence seeking bail. She did so with reference to several key authorities on the point (cf. *S v Dlamini and others*, *S v Joubert*; s v Schietekat [1999] ZACC 8; 1999 (2) SACR 51 (CC); *S v Petersen* 2008 (2) SACR 355 (C); *S v Botha* and another 2002

(1) SACR 222 (SCA)).

[84] It was not argued that the magistrate had erred in relation to the test to be applied. It was however suggested in the heads of argument, although not argued before me, that the magistrate had set the standard impossibly high in her application of the test for exceptional circumstances to the facts of the case. I do not agree. The test was applied correctly. The magistrate considered all of the factors which are ordinarily taken into account and those which the appellant has advanced in his application. She came to the conclusion on the totality of the evidence that the appellant had not discharged the onus to establish, on a balance of probability, that exceptional circumstances exist which, in the interests of justice, permit the appellant to be released on bail. I am unable to find that the magistrate was wrong in so doing.

[85] I therefore make the following order:

The appeal is dismissed.

G.GOUSEN

JUDGE OF THE HIGH COURT

Appearances: For the Appellant

Mr. M. Hellens SC, assisted by Mr. T. P. Price SC

Instructed by Griebenouw Attorneys

C/o Netteltons

For the Respondent

Mr. M. Stander

Office of the Director of Public Prosecutions

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