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REPORTABLE

IN THE NORTH GAUTENG HIGH COURT.

PRETORIA /ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: A72I/2010

DATE: 17/11/2011

IN THE MATTER BETWEEN

D J VV

1st APPELLANT

A E V V

2nd APPELLANT

M DA

3rd APPELLANT

A T A

4th APPELLANT

J J VV

5th APPELLANT

J S MVV

6th APPELLANT

G S VV

7th APPELLANT

M DS

8th APPELLANT

JS

9th APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

LEGODI. J

[1] Before me, is an appeal against the refusal of the release on bail of the eight appellants who appeared in the Regional Court Wonderboom Pretoria-North on various charges under the Sexual Offence Act to wit compelled rape of minor children, sexual assault of minors, sexual grooming of minor children, exposing minor children to publications of sexual nature, of children and benefiting from child pornography, ect.

[2] Initially, eight appellants appeared in the regional court when their application to be released on bail was refused on 4 January 2011. These were appellants one to eight as cited in this appeal. Appellant nine whose bail application was refused on 6 April 2011 was only arrested on 26 January. The other eight appellants were arrested on 2 December 2010. Appellant number one has since withdrawn his appeal and only the appeal of appellants two to nine was argued before

[3] At the start of the hearing of this appeal, counsel for the respondent was requested to restate the grounds on which the release of the appellants on bail was objected to in the court a quo. They were summed up as follows:

- 3.1 that the appellants if released on bail were likely to influence or intimidate state witnesses;
- 3.2 that the appellants if released on bail were likely not to stand trial;
- 3.3 that the state case against the appellants is strong and that if convicted they are likely to be imprisoned;
- 3.4 and that there was a possibility of the appellants reoffending.

[4] These appear to be the usual grounds normally raised by the state in opposing the release of an accused person on bail. For example, section 60(4) of the Criminal Proceeding Act 51 of 1977 (hereinafter referred to as "the Act"), provides as follows:

"(4) The interest 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 the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule I offence; or

(b) Where there is the 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 the 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 the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; (e) Where accused will disturb the public order or undermine the public peace or security; or [sic] "

[5] It was common cause during the bail proceedings in the court a quo that the appellants were charged with Schedule 6 offences. Section 60(l)(a) of the Act provides that notwithstanding any provision of the Act. where an accused is charged with an offence referred to in Schedule 6, the court shall order the accused to be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.

[6] The question before me is therefore whether the court a quo erred in finding that the appellants did not succeed in showing that there were exceptional circumstances entitling them to be released on bail.

[7] An applicant in a bail application is given a broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant (accused) or anything else that is particularly cogent. (See *S v Dlamini; S v Dladla & Others; S v Joubert, S v Schiet...* 1999(2) SACR 51 (CC) in particular paragraphs [75] and [76] thereof.) Personal circumstances present to an exceptional degree, may lead to a finding that release on bail is justified. (See *S v Rudolph* 2010(1) SACR 262 (SCA).)

[8] In the context of section 60(1 l)(a). the exceptionality of the circumstances must be such as to persuade a court that it would be in the interest of justice to order the release of the person of the accused. A certain measure of flexibility in the judicial approach to the question is required. (See *S v Mohammed* 1999(2) SACR 507 (C) at 513F-515F.)

[9] It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To incarcerate an innocent person for an offence which he did not commit could also be viewed as exceptional. It could not have been the intention of the legislature in section 60(4)(a) of the Act. to legitimise at random the incarceration of persons who are suspected of having committed Schedule 6 offences, who. after all. must be regarded as innocent until proven guilty in a court of law. (See *S v Jonas* 1998(2) SACR 673 (SEC).)

[10] The real case argued before me on behalf of the state (the respondent) is that there is a strong case against the appellants and that this could encourage the appellants not to stand

their trial, if released on bail for fear imprisonment. I am saying this because, the state did not seriously seek to argue that the appellants are flight risks.

[11] The court a quo in its judgment expressed itself in Afrikaans as follows:

"Die persoonlike of finansiële omstandighede wat beskuldigdes 1 tot 8 voor die hof geplaas het is niks anders as die normale omstandighede van alle persoon wat voor die hof verskyn en aansoek doen om borg nie en dit voel doen beslis nie aan die vereistes soos gestel in die Hoogste Hof van Appel in die saak Staat versus Botha en andere 2002 (A) en daar in, dit is die bekende saak van 'n paar jaar gelede van die rugbyspelers van Pietersburg wat gearresteer was vir moord."

[12] Firstly, I do not understand VIVIERS, ADCJ. in that case, as he then was, as having suggested that those factors set out for consideration under section 60(4) ought to be ignored or disregarded under section 60(1)(a) in determining the existence or otherwise of exceptional circumstances. To ignore personal factors of an applicant under section 60(11), in my view, would have the effect of denying an applicant a reasonable opportunity to adduce evidence to satisfy the court of the existence of exceptional circumstances. But even most importantly, it would be difficult, if not impossible to establish such exceptional circumstances.

[13] Secondly, KRIEGLER, J, as he then was. in Dlamini, supra, made it perfectly clear that such factors are relevant in determining the existence of exceptional circumstances. At the risk of repeating himself, he expressed himself as follows:

"An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the appellant or anything else that is particularly cogent."

[15] It is therefore clear from the quotation by the court a quo that it moved from the wrong premise. In my view, it is the wrong premise that made it to concentrate only on the seriousness of the offence without dealing with the case whether if released on bail, they would interfere or intimidate state witnesses or whether their personal circumstances are such that they would not stand trial. All the six victims of crime, the children, at the time of the hearing of the bail application, were in various places of safety. Secondly, statements were taken from them or from most of them. Access to them was and still is not easy, if not impossible unless with the permission by those in charge. For example, there was a suggestion that at one stage before her arrest, appellant nine attempted to contact victim 6. who is her son. Seeking to interfere with witnesses, who have already made statements to the police, is minimised. The potential, for such interference is having less impact.

[16] I do not intend dealing with the personal circumstances of each appellant in detail. It is important to mention that it did not appear to have been the state's attitude in the court a quo and also in this appeal to be that the appellants have the means to evade justice or that they attempted to do so, either before their arrest, during the bail proceedings and thereafter. They are all South Africans. Most of them had never been outside the country, neither do they have passports. They do not have previous convictions, all of them. They do not have other pending cases. Their addresses are known to the police. They have been staying at their respective places for a range period of between five, nine months, seven years and fifteen years.

[17] Coming back to the strength of the state case against the appellants, the court a quo much relied on the hearsay evidence of the investigating officer and at least a statement

made to the police by the 9 year old son of appellants eight and nine. His evidence was seen, as also argued by counsel on behalf of the state in this appeal, corroborating the investigator's hearsay evidence.

[18] In paragraph 2 of her statement, the investigating officer stated as follows:

"Op 2010/10/12 het ek 'n klagte ontvang van verkragting, onsedelike aanranding, seksuele aanranding, voorbereiding en gereedmaking tot seksuele daade (grooming), vervaardiging, besit en verspreiding van kinder pornografie, die wys van pornografie en kinderpornografie, bloedskande. Die feite van die saak is dat aangeklaagde nr 1 en 2 was die pleegouers van twee minderjariges pleegkinders, van die ouderdomme 5 jaar en 7 jaar, vanaf hulle klein babas was, sedert 2005 en 2006. Die twee kinders was veiwwyder op twee verskillende datums vanuit die sorg van aangeklaagde 1 en 2 deur die CMR Pretoria, en was dan geplaas op twee verskillende plekke van veiligheid. Die twee kinders het geen kontak sedertdien die plasing plaasgevind het nie. Beide kinders is gesien deur verskillende sielkundiges. Beide kinders was deur twee verskillende forensiese sielkundiges gesien en verslae is bekom. Beide het ook mediese ondersoeke ondergaan en volgens die uitslag, was beide kinders seksueel misbruik vanaf 'n jong ouderdom. Hulle stories kom ooreen met mekaar, alhoewel hulle geen kontak met mekaar gehad het nie, of oor die saak kon gepraat het met mekaar nie, want hulle was in verskillende plekke van veiligheid. Daar is verskillende verdagtes wat die kinders benoem. Deur middel van die verklaring wat bekom is, word aangeklaagde 1, 2, 7 en 8 geimpliseer by die uilvoering van verkragting, onsedelike aanranding, seksuele aanranding, voorbereiding en gereedmaking tot seksuele daade (grooming), vervaardiging, besit en verspreiding van kinder pornografie, die wys van pornografie en kinderpornografie, bloedskande. Aangeklaagde 3 en 4 word geimpliseer vir die voorbereiding en gereedmaking

tot seksuele dade (grooming), deur middel van dat hulle seksuele dade voor die kinders gedoen het. Hulle is ook in besit van self gemaakte kinderpornografie. Aangeklaagde 5 en 6 word geïmpliseer vir die voorbereiding en gereedmaking lot seksuele dade (grooming), deur middel van dat hulle seksuele dade voor die kinders gedoen het. Die twee aangeklaagdes was ook teenwoordig gedurende die pleeg van seksuele dade deur die kinders, waar hulle die kinders aangese het wat om te doen, gedurende die maak van die films. Alle aangeklaagdes 1-8 is ook geïmpliseer deur dat hulle mededaders, medepligtiges en begunstigdes."

[19] In so far as direct evidence is concerned, the state appears to be intending to rely during the trial, on the evidence of very young children. Aged 5 and 7 years at the time the statements were taken, in my view, suggest not an easy ride for the state during trial. I am talking here about victims 1 and 2 who were removed from appellants one and two. Assuming that their evidence collapses during trial through questioning, the state would be bound to rely on circumstantial evidence based on expert witnesses regarding professional or medically physical or psychological examinations of the victims. This may not be an easy mountain to climb, where the state has to prove their case beyond reasonable doubt.

[20] Few items were seized from the premises of appellants one to four. At the time of the bail application, some of these items were still sent for forensic examination. It is not clear from the statement of the investigating officer as to what kind of items were so seized as a whole.

[21] Further in her statement, commissioned on 6 December 2010. the investigating officer states as follows:

"Alle elektroniese bewysstukke is by die forensiese en intelligensie rekenaar eenheid ingehandig vir analisering. Voledige verslag word afgewag. 'n Groot mate van video's is ook

gekonfiskeer en word tans deur ondersoekbeampte gekyk. Daar was sover 'n paar nakende foto's van 'n klein, minderjarige kind gevind, waarvan die geslagsdele getoon word. Daar was ook 'n handgemaakte vuurwapen gevind in die huis van beskuldigde 1 se huis gevind wat na die ballistiese afdeling van die forensiese eenheid gestuur is van die SAPD."

[22] In my view, this statement cannot be regarded as making a strong case against the appellants. The least one can say about it, is that at the time of the bail application, investigation was still incomplete. But, what is important, there was no suggestion that the appellants will tamper with such investigation or information still outstanding.

[23] At the risk of repeating himself, in paragraph 3 of the investigating officer's statement, he deals with all the first to the eighth appellants as follows:

"Ek het die beskuldigde se persoonlike besonderhede nagegaan en die volgende gevind:

3.1 Identiteit dokumente van beskuldigdes Alle beskuldigdes het 'n ID dokument

3.2.1 Burgerskap

Alle beskuldigdes is RSA burgers

3.2.2 Vorige reise buite RSA Geen

3.2.3 Familie buite RSA

Geen

3.2.4 Besi (lins bui/e RSA Geen."

[24] This information makes the chances of the appellants leaving the country to be very minimal. By the way, appellants one and two are husband and wife. They have both been staying at Plot 62 Juliet Street, Lusthof, Pretoria as husband and wife for a period of over fifteen years.

[25] Appellants 3 and 4 are husband and wife. They were staying together at House 5, Plot 187 Witstinkhoutboom, Bultfontein, Pretoria. It is a rented house and have been staying there for a period of over five months. Appellants five and six are also husband and wife and the two were staying at Plot 33. Bultfontein, Pretoria. It is a rented place and having been so rented for a period of over nine months. Appellant seven who is unmarried is also staying at the same place as appellants five and six. Appellants eight and nine as I said earlier in this judgment, are also husband and wife. They were staying at Plot 62 Juliet Street and have been staying there for a period of over seven years.

[26] Appellant nine is the daughter of appellants one and two and appellant eight is their son-in-law.

[27] What was referred to in this appeal as victims one and two were the intended adopted children of appellants one and two and had been staying with them for years. As I said earlier, victim six is the son of appellants eight and nine.

[28] Coming back to the strength of the evidence against the appellants, in the bail application, the state relied on the direct evidence of victim six as he was referred to in these proceedings, particularly with regard to appellant nine during her bail application. His evidence is contained in a typed statement consisting of four and a half pages. The statement was deposed to on 28 March 2011. That is. after the application of appellants one to eight was refused. Remember, the bail application of his mother, appellant nine, was refused on 6 April 2011 after she was arrested on 26 January 2011.

[29] Perhaps. 1 should just start with the allegation that was made against appellant nine. The suggestion was that even after an attempt to have contact with victim six, there was still no justification to refuse her release on bail. I agree. How do you expect a mother of a nine year old child not to want to see her child, particularly that at the time she was not accused of anything.

[30] The statement of victim six having been deposed to on 28 March 2011. It could not have been relied upon as evidence on which the bail application of the first to eighth appellants that was refused on 4 January 2011. It therefore appears that in refusal of the bail application of first to eighth appellants was, solely based on the hearsay evidence of the investigating officer and on the circumstantial evidence of Dr Zylinga with regard to victim two. In its judgment, with regard to the bail application of appellants one to eight, the court a quo expressed itself in Afrikaans as follows:

"As ons kyk na die staat se saak, die staat steun op verklarings van die twee kinders wat verwyder is van beskuldigde 1 en 2 en by verskillende plekke aangehou en geplaas is na die vewydering en nie met mekaar kontak gehad het nie.

Hulle staaf mekaar se verklarings en beide verskaf baie fyn detail ten opsigte van hoe, waar en wanneer die verkrachtings plaasgevind het. Beide is ook onafhanklik deur verskillende deskundiges geassesseer en beide se assessering bevestig die klagtes. Daar is ook mediese verslae by die verkrachtings bevestig. Slegs beskuldigde 1 en 2 het getuig. Hulle is reeds deur die hof vandag hierso as ongeloofwaardig bevind."

[31] Remember victims one and two referred to in the quotation did not testify, neither were their statements handed in. It was the evidence of the investigating officer that was relied upon. For example, in his statement and at the risk of repeating myself, she stated as follows:

"Daar is verskillende verdagtes wat die kinders benoem. Deur middel van die verklaring wat bekom is, word aangeklaagde 1, 2, 7 en 8 geimpliseer by die uitvoering van verkragting, onsedelike aanranding, seksuele aanranding, voorbereiding en gereedmaking tot seksuele daade (grooming), vei'vaardiging, besit en verspreiding van kinderpornografie, die wys van pornografie, en kinderpornografie, bloedskande."

[32] This was in so far as it went against appellants 1, 2, 7 and 8. The particulars of such accusations against each of the appellants are not set out. There was a suggestion that the state will in respect of the appellants rely on the principle of common purpose. That may be so, and even in that event, one needs to articulate in evidence the actions of each appellant to bring each one of them within the principle of common purpose. Their involvements as quoted above are worded in general terms. Bearing in mind that one for direct evidence relies on the evidence of young children, I do not think that the evidence can be said to exclude any innocence on the part of the respective appellants. Remember, all the appellants were to be presumed innocent until the contrary is proved. This is a reminder, that even where the evidence appears to be strong, one should still be mindful of the fact that you do not have to deal with the bail application, as if their guilt has already been proved.

[33] Prima facie evidence is subject to be tested during trial. The impact of such prim a facie evidence in a bail application, should be seen to be minimised by lack of evidence of the likelihood that if released on bail, the accused will attempt to influence or intimidate witnesses or to attempt or destroy evidence. I dealt with this aspect earlier in this judgment. No such a suggestion against the appellants was made. In any event, witnesses are safe, statements have been taken from witnesses, and there was no suggestion that the police were in pursuit of other exhibits. The likelihood of any of the appellants to evade trial other

than to suggest a strong case, was not established.

[34] As far as appellants three and four are concerned, the evidence of the investigating officer went around like, and I am doing this at the risk of repeating myself:

"Aangeklaagde 3 en 4 word geïmpliseer vir die voorbereiding en gereedmaking tot seksuele daade (grooming) deur middel van dat hulle dade voor die kinders gedoen het."

[35] The extent to which they have been implicated is not outlined. Bearing in mind that this was a statement by a person not having personal knowledge thereof, one should still be guided by the principle that they are presumed innocent until the contrary is proved. Similarly, with regards to appellants five and six, allegations against them are couched in similar fashion.

[36] Dr Zylinga who was called by the first and second appellants indicated that victims one and two who were initially in the care of the two appellants, depicted some form of sexual molesting and that it showed recent occurrences. This may tend to show prima facie evidence against the two appellants. But again, the issue is, this alone would not serve to show that they would not stand trial. They had been staying at their places before their arrest for a period of about seventeen years. As indicated by the investigating officer, they have no passports, no previous convictions and no attempt before their arrest to evade justice.

[37] Coming back to the evidence of victim six, he was assessed forensically. First, on 9 December 2010 and on 14 January 2011, 15 February 2011 and 15 March 2011. Remember, he deposed to a statement on 28 March 2011. Apparently as a result thereof, appellant nine was arrested. His statement seems to detail the actions of appellants one, two, eight and nine

in the commission of the offences levelled against them. These details were not taken into account when the bail application by appellants one to eight was refused. For the purpose of this appeal, the details to which the first to eighth appellants had not been preview to, during the bail application in the court a quo, cannot be used against them in this appeal.

[38] I may however mention that the first appellant who has since withdrawn his appeal, is seriously implicated in the statement. Appellant nine in her evidence during the bail application sought to deal with the allegations made against her and also revealed her personal circumstances.

[39] She was working as a manager at a certain supermarket in Hammanskraal. She had been working for almost eleven years until her arrest in January 2011. She was earning R11 000,00 per month. At the time of the bail application, her employer had already visited her in prison and she was assured of the security of her job despite pending case.

[40] She in more detail dealt with inter-relationships amongst the appellants. She is the biological daughter of appellant two. Appellant one is her stepfather since she was still about 3 years old. Appellant three is her brother. Appellant four is the wife of appellant three. Appellants three and four had two children at the time of the bail application, aged about 4 and 8 years respectively. These children have also been placed at a place of safety. These children were referred to in these proceedings as victims 3 and 4. Appellant five is the brother to her stepfather (appellant one). Appellant six, is appellant five's wife. Appellants five and six have a child about 13 years old, who has also been taken to a place of safety. She is victim 5. Appellant seven is apparently the son to appellant five.

[41] Appellant nine denied all the allegations leveled against her. She also denied her role as set out in her son's statement. She was cross-examined at length on the allegations made by her son. In my view, she sustained the fierce cross-examination and nothing particular in her evidence to suggest unreliability. Her denial in this regard must also be seen in the light of the fact that despite the fact that victim 6, that is appellant nine's son, was assessed or interviewed on 9 December 2010, 14 January 2011, 15 February 2011 and 1 March 2011, only after 1 March 2011, did he make a statement and only thereafter was appellant nine arrested. It appears therefore that until up to 28 March 2011 when victim six made a statement, he had not implicated appellant nine, otherwise appellant nine would long have been arrested, possibly with the rest of the people when they were arrested on 2 December 2010. I am mentioning all of these, because the issue is whether the state has a strong case against appellant nine. Even if they had, the issue is whether or not she will stand trial.

[42] The rest of the appellants having been arrested on 2 December 2010, in her presence, she remained where she has been staying with some other people. She apparently continued to go to work. If she was convinced that she was involved in the commission of these offences and she was a flight risk, she would have attempted to evade justice by disappearing prior to her arrest. Her conduct is not consistent with a person who is a flight risk.

[43] On 16 March 2011, the investigating officer deposed to an affidavit dealing with appellant nine. She refers to the previous assessment on victim six. She also testified about victim six and statements of other witnesses. I may mention that in terms of the statement of victim six, appellant nine is the less implicated person.

[44] I am not satisfied that the court a quo was correct in finding that the appellants did not

establish the existence of exceptional circumstances. Just before I conclude, there are other two issues I want to deal with. First it is the suggestion that the appellants may reoffend. To come to this conclusion, one needs to ignore the suggestion that this is said to be a family syndicate that is alleged to have used their children as the subjects for pornographic materials and for unlawful sexual activities. You need to ignore the fact that these children are at places of safety. The fact that all the appellants have now been charged with these unlawful activities is not immaterial to the question whether or not they will reoffend. The fear should be seen to have been minimised by the fact that if it happened, it is now in the open. You need someone courageous to continue with similar offences. Therefore, the likelihood of reoffending in these circumstances is very minimal, especially seen in the light of the fact that there was no evidence that the commission and means thereof went beyond family unit. That is, that they could easily find other victims to use in the commission of similar offences.

[45] In its judgment the court a quo sought to explain how public interest in a particular case should not be allowed to dictate to our courts what to do in a particular case. Perhaps it needs some sort of education to dispel any perception the public might have in a particular case or circumstances. As correctly pointed out by the court a quo and in other cases, in a bail application the issues are dealt with on the basis that it is not much about the guilt or otherwise of an applicant in a bail application, but rather like in the present case, whether the appellants should have been found to have established exceptional circumstances that their release on bail would not interfere or jeopardise the interest of justice.

[46] Section 60(4)(c) of the Act provides that the interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of

criminal justice system, including the bail system. Subsection (7) deals with what is envisaged in subsection (4)(c). Subsection (7) of section 60 provides as follows:

"(7)in considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-

(a) The fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

(b) Whether the witnesses have already made statements and agree to testify;

(c) Whether the investigation against the accused has already been completed;

(d) The relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) How effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;

(f) Whether the accused has access to evidentiary material which is to be presented at his or her trial;

(g) The ease with which evidentiary material could be concealed or destroyed; or

(h) Any other factors which in the opinion of the court should be taken into account. "

[47] In a way, I have already dealt with factors tabulated under subsection (7) and I do not find it necessary to repeat myself in one way or the other.

Subsection (8A) of section 60 deals with what is envisaged in section 60(4)(e) of the Act. By the way, it provides that interests of justice do not permit the release from detention of an accused where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security. I have to deal with this, because of what was contended by the appellants' counsel in his written heads of argument. He started on the issue by stating as follows in paragraph 3 of the written heads of

argument:

"The case against the appellants are highly publicized in the media and was the allegation made that the appellants, who are all related to each other, were exposed as being members of a so-called 'child pornography syndicate'. It is also alleged that they are guilty of offences relating to the sexual assault, grooming of making of explicit sexual photography and/or films containing child pornography, and also sexual acts performed by adults in the presence of minor children."

[48] Having said this, in paragraph 19.5 of the heads of argument he concluded on the issue as follows:

"It appears that the learned magistrate although stating that he was not in any way influenced by public opinion were carried away with the allegations which are of a very serious nature. The fact that the case are of a high profile and widely publicized in the printed media as well as on television appeared to have influenced the magistrate not to apply his mind with regard to the general principles applicable in a bail application.

[49] Subsection (8A) provides as follows:

"(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) Whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) Whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) Whether the safety of the accused might be jeopardized by his or her release;

- (d) Whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) Whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) Any other factor in the opinion of the court should be taken into account. ”

[50] It is clear from the provisions of subsection (4)(e) that only in very exceptional circumstances would a court consider the likelihood of disturbance, public order and undermining of the public peace or security. Factors in this regard and enumerated in subsection (8A) had not been established negatively to the appellants to have justified the refusal of the release of the appellants on bail.

[51] Although this aspect was not argued by the state before me, I am just dealing with it, in case there might be a perception with regard to the order I intend making hereunder. I have deliberately quoted the specific sections in this regard as an educational measure to any person who might have to read this judgment. Subsection (9) provides that in considering the question in subsection (4), the court shall decide the matter weighing the interests of justice against the right of the accused to his or her 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:

- “(a) the period for which the accused has already been in custody since or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defense or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account. "

[52] To suggest that any of these factors do not have to be taken into account, where an applicant in a bail application under Schedule 6, faces a hurdle to establish the existence of exceptional circumstances, in my view, would amount to summarily refusal to release an applicant under section 60.

[53] It has been made clear when the appeal was argued and I want to assume that it was also clear to the court a quo that the main case in this matter is likely to be finalised after many years. For example, it has not started yet. The suggestion that there are more than hundred charges to be preferred against the appellants serve to indicate, unless the appellants are released on bail, they stand to remain in custody for many years to come before their case is finalised. The court a quo did not seem to have considered this aspect, in my view, incorrectly so.

[54] I am satisfied that the appellants during their respective bail applications succeeded in showing that they are not flight risk, that other than the offence they are presently facing, they had been law abiding citizens and thus dispelling the idea of reoffending, that their incarceration would deprive them of earning a living and that the likelihood of interfering, intimidating or influencing state witnesses was almost zero regard been had to the fact that the witnesses are kept in places of safety, and have made statements, ect.

[55] Bail conditions have always served to ensure that whatever fear the state might have in the release of an accused person is taken care of. It is a necessary consideration as also envisaged in section 60(6) which provides that in considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached.

[56] Can a condition that the appellants should not communicate with state witnesses be easily breached? Of course not. Can the appellants easily abscond and evade justice? I do not think so. But even most importantly, strict reporting conditions can serve the purpose. When I reserved judgment in this matter, I requested both counsel to go and agree on possible bail conditions in the event this court was to uphold the appeal. A draft order in this regard was submitted to the Registrar and it reads as follows:

"1. The appeal is upheld.

2. Bail is granted to Appellant 2 to 9 in the amount of R10 000,00 on the following conditions:

2.1 The Appellants must attend Court at all times up and until finalisation of the trial.

2.2 The Appellants must report twice daily between the hours of 06h00 and 09h00 and 18h00 to 21h00 at the Hammanskraal Police Station.

2.3 The Appellant may not have any contact, communication directly or indirectly with any of the State witnesses.

2.4 The Appellants may not leave the jurisdiction of the Regional Court, Pretoria North (Gauteng) without the prior permission of the Investigating Officer of the case.

[57] I do not know whether both the defence and state participated in this draft. It is, however, helpful with regard to the proposed reporting conditions. The rest are usual bail conditions. I am mindful of the fact that appellants 3, 4, 6 and 7 were staying at rented places before their arrest. An appropriate order in this regard would be made later in this judgment. It suffices to mention that an address where they would be living be furnished to the investigating officer before they are allowed to be released from custody. Secondly 2.4 as indicated in the draft order, is too wide. Restriction to magisterial district of Wonderboom, Pretoria- North, in my view, would be appropriate in the circumstances of the case.

[58] Consequently an order is hereby made as follows:

58.1 Appellant one's withdrawal of the appeal is noted.

58.2 The appeal against the refusal of release on bail in respect of appellants two to nine is hereby upheld and the decision refusing the bail application is hereby set aside and substituted as follows:

58.2.1 Accused two to nine are hereby each granted bail in the amount of R15 000,00 on the following conditions:

58.2.1.1 that the accused 2 to 9 must attend court on all remand dates;

58.2.1.2 that accused two to nine must report twice daily between the hours of 06:00 and 09:00 and 18:00 to 21:00 at the Hammanskraal police station;

58.2.1.3 that accused two to nine may not have any contact or communication, directly or indirectly, with any of the state witnesses;

58.2.1.4 that accused two to nine may not leave the magisterial of Wonderboom Pretoria North save for A the purpose of reporting at Hammanskraal police station and/or save with the written permission of the investigating officer in this matter;

58.2.1.5 accused three, four, five, six and seven are hereby ordered to furnish the

investigating officer before their release with physical address where they would be staying pending finalisation of the main case.

58.2.1.6 The Appellants 2 to 9 will notify the Investigating officer of any changes of their addresses and such notification to be given at least seven days before moving out of the known addresses to the investigating officer.

58.3 The investigating officer is hereby forthwith directed to furnish the station commissioner of Hammanskraal police station with the court order herein.

58.4 The station commissioner of Hammanskraal police station or any person designated thereto by the station commissioner Hammanskraal police station, is hereby directed to immediately inform the investigating officer should any of the accused herein default in reporting as set out in 58.2.1.2 above.

M F LEGODI

JUDGE OF THE NORTH GAUTENG HIGH COURT