

**THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO.: CA&R 03/2012

In the matter between:

THOZAMA KHANYISO GCWABE

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

DUKADA, AJ

INTRODUCTION

[1] The appellant in this matter was initially arrested on the 22nd November 2007 and was charged with a number of charges, namely:-

- (i) 502 counts of fraud involving use of credit cards data, alternatively contraventions in terms of the Electronic Communications and Transactions Act 25 of 2002 by cloning the credit cards mentioned in the afore-said 502 counts. These counts relate to acts committed during the period from 24th October 2007 to the 7th July 2008.
- (ii) Counts 503 to 529 in which he is charged of contravening section 45 read with section 1, 44(1)(a) and 51 of the Regulation of Interception of Communications and Provision of

Communication-related Information Act 70 of 2002 read with Regulation 1263 as promulgated under Government Gazette No. 28371 dated 29-12-2005 in that during the period between October 2007 to August 2008 he did wrongfully and unlawfully manufacture, assemble possess, sell, purchase or advertise some master cards international visa international cards, diners club cards and American Express cards, Capital 1 Bank USA cards and FNB visa Gold cards;

- iii) Counts 557-564 in contravention of the Electronic Communications and Transactions Act 25 of 2002 by cloning various credit and debit cards on or about 11th March 2008 and 8th August 2008;
- iv) Count 565-money laundering in contravention of the Prevention of the Organized Crime Act 121 of 1998 during the period between 7th and 8th August 2008;
- v) Count 567-Contravention of section 67A of the Criminal Procedure Act 51 of 1977 for failing to comply with bail conditions.

[2] The appellant was arrested and charged with another person, both applied for bail and were both refused. It is only Appellant who has appealed to this Court against such refusal.

[3] The charge sheet with the record bears Case No.: CCC1/05/10 which appears to be a case number of the Complex Commercial Crime Court, Port Elizabeth.

[4] The first date of appearance is reflected as 29th January 2010. In the preamble to Count 567 it is reflected that Appellant was arrested on the 18th December 2007 and was released on a bail of R15 000,00 in Court 22 of the Port Elizabeth Magistrate's Court. A further condition of the bail was that the Appellant be under 24 hours "house arrest" at house No. 5344 Saba Street, Kwazakhele, Port Elizabeth. The aforementioned bail condition was amended reducing the 24 hours

arrest to between the hours of 18H00 and 6H00 daily.

- [5] While out on bail Appellant was again arrested on the 20th or 21st August 2008 at Caltex La Poche Motors in connection with Counts 440 to 453, 457,458, 462, 463 and 470 involving fraud alternatively the wrongful and unlawful cloning of Visa foreign cards, American Express card and Master card.
- [6] Appellant was also charged with count 567 mentioned in para 1(v) above.
- [7] From the record his first appearance in Court, which in this instance is the Regional Magistrate's Court, Port Elizabeth, is reflected as the 29th January 2010. I assume that before that, after his second arrest, Appellant has been appearing in the Magistrate's Court, Port Elizabeth. Appellant was then remanded in custody a number of times and he applied for bail on the 9th June 2011 and the application was refused on the same day.
- [8] Appellant was legally represented by Mr Bence during his bail application.
- [9] Appellant noted on appeal against the decision refusing his bail application to this Court on the 1st January 2012.
- [10] Appellant has filed an affidavit together with his Notice of Appeal in which he explains the reason for his failure to note his appeal timeously. He cites the following reasons:-
- (i) due to financial constraints he decided to provisionally delay noting this appeal but rather give preference to ensuring that the trial proceeds on the 15th to 19th August 2011 which were dates of trial of the main case. Unfortunately the case was postponed for trial to the 22nd June 2012.
 - ii) There was also a delay in obtaining the transcribed record of the

bail application proceedings;

- iii) He also experienced difficulties in raising funds to engage an attorney.

[11] It is also apparent from the record that the Appellant changed the legal representative who handled his bail application and another one is handling this Appeal on his behalf. It is not stated in the papers as to when his new legal representative took over. Although the delay to note this appeal has taken about six months, it appears to me that for most of that time the Appellant was in custody and not legally represented.

Without going deep into this aspect I am of the view that Appellant's failure to note the appeal timeously should be condoned and is hereby accordingly condoned.

[12] The Appellant's bail application was proceeded with as a scheduled 1 offence bail application and as such was subjected to section 60(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) which provides:-

"An accused who is in custody in respect of an offence subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence if the Court is satisfied that the interests of justice so pursuit."

[13] From the facts of this matter it appears that this bail application related to the arrest and detention of the Appellant in respect of a Schedule 1 offence allegedly committed while he was out on bail in respect of a schedule 1 offence. However, when Appellant was charged, the new charge or charges were simply added to the old charges in the old charge sheet. That seems to be what has caused confusion as to how the bail application should be proceeded with. The question to look into this whether this bail application should not have been treated as a schedule 5 offence bail application.

[14] Ordinarily the offence in respect of which the Appellant was arrested and detained in this matter is a Schedule 1 offence, but what gives an extra colour to it is that it was allegedly committed while the Appellant was out on bail in respect of another Schedule 1 offence. Schedule 5 to the CPA provides as follows in regard to a Schedule 1 offence which turns to be a schedule 5 offence:-

“An offence referred to in Schedule 1-----which was allegedly committed while he or she was released on bail in respect of an offence referred to in Schedule1.”

[15] The Magistrate addressed this particular question as follows in his judgment¹:-

“Should the State (sic) have to choose (sic) to charge the accused on a separate charge sheet and this application have been brought before Court I keep in mind this would have been a Schedule 5 offence as the accused have in the past already been or stand trial on a Schedule 1 offence as being a second Schedule 1 offence. However, irrespective of the test the Court applied to determine whether or not the accused is a suitable candidate for trial. I am satisfied that the answer will remain the same.”

[16] In my view the difference in proceeding with the bail application as in respect of a Schedule 1 offence or a Schedule 5 offence, is on the question as to on whom the onus rests to show that it is in the interests of justice that the accused been admitted to bail or be refused, as the case may be. If the offence is a Schedule 1 offence such onus rests on the State whereas if it is a Schedule 5 offence it rests on the Appellant.

[17] Dealing with the onus created by section 60(1)(a) of the CPA, Van Dijkhorst J remarked as follows in S v Vermaas² at 530 d-e:-

¹ At page 28 lines 12-20 of the record
² 1996(1) SACR 528

“The general rule set out in section 60(1)(a) is that the accused is entitled to be released on bail unless the Court finds that it is in the interests of justice that he be detained in custody. That wording, in my view, creates an onus. The onus rests upon him who asserts that the accused should not be released, that is the State.”

- [18] In regard to the onus in respect of a Schedule 5 offence, the learned Judge goes on to say at page 530 para g-h:-

“A number of crimes on which the applicant stands arraigned fall under Schedule 5. In essence the charges amount to so-called round-tripping by the illegal use of the financial rand. The applicant therefore bears the onus to satisfy me on a balance of probabilities that the interests of justice do not require his detention.”

- [19] One may also have regard to the following remark by Kriggler J in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*³ at para 65; in respect of the onus created by section 60(11)(b) of the CPA:-

“This view is strengthened by a consideration of section 60(11)(b). That section stipulates that an accused must satisfy a Magistrate that the ‘interests of justice’ permit his or her release. It clearly places an onus upon the accused to adduce evidence -----It is clear that an accused on a Schedule 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant.”

- [20] Coming to the present case, in my view, the bail application should have been proceeded with as in respect of a Schedule 5 offence. The onus, as a consequence thereof, would have rested upon the Appellant to satisfy the Court *a quo* that the interests of justice permit his release. He would have had to discharge that onus on a balance of probabilities. What has happened in this bail application has affected the sequence of evidence. BINNS-WARD AJ remarked as follows, in connection with that aspect, in *S v Porthen & Others*⁴ at para 60:-

³ 1999(2) SACR 51

⁴ 2004(2) SACR 242 (c)

“-----the Magistrate and the prosecutor acquiesced in the request by the appellants’ legal representative, that the investigating officer, who obviously was a State witness, should testify first. I consider that it was undesirable that they should have done so. The legislature scheme of section 60(11)(a) of the CPA indicates that it is for the applicants in cases affected by the provisions to put their case forward first and for the State to answer it. An applicant for bail in a case subject to section 60(11)(a) obtains a potential and unintended advantage if the bail hearing is conducted in an order at odds with the plain legislative intention.”

I fully agree with these comments and in my view they apply equally to an application for bail which is subject to section 60(11)(b) of the CPA. I will, however, revert later in this judgment as to the consequences thereof, if any, in respect of the result of the Appellant’s bail application.

[21] I now turn to the facts of this matter. The State was the first to adduce evidence through only one witness namely Kevin Wayne Godfrey, a member of the South African Police Services, holding a rank of an Inspector. His evidence is that he is the investigating officer in this matter. The appellant is charged with several counts of fraud as well as contravention of the Electronic Communications Act and contraventions of bail conditions. The Appellant was first arrested and thereafter released on bail of R15 000,00 plus a condition which he described as “house arrest”. The “house arrest” condition was later reduced to 6am up to 6pm, meaning that the Appellant was required not to leave his house or home between 6am and 6pm. Appellant while out on the afore-mentioned bail allegedly committed further offences similar to the first ones and was arrested at the scene of the crime.

He objected to the granting of bail to the Appellant on the following grounds:-

- i) He was a flight risk;
- ii) He committed exactly the same offences while he was out on

bail and a laptop was found in his possession containing information which was obviously to be used in committing further crimes. The laptop was sent to experts who found that it contained information of cloned cards belonging to overseas account holders.

- iii) There was a strong case against the Appellant. There is a lot of video footage at businesses where the cloned cards were presented for purchasing goods. Few of the cloned cards have been recovered.

[22] Under cross-examination by Mr Bence, legal representative for the Appellant, Mr Godfrey stated that he has not personally watched the video footage.

The case for the State was then closed.

[23] Appellant also testified. He told the Court that he was arrested and released on a bail of R15 000,00 plus a condition of "24 hours house arrest" which was later reduced to 18h00 to 6h00. He attended Court on all dates of his case. He was re-arrested on an allegation of having used a cloned card at a garage in Port Elizabeth. He denies to have done that. He said that incident happened at about twenty minutes past 5pm. He was asked by the management of the garage to wait for the owner and police to arrive there. He said according to the video footage that he watched at the garage he was there before 6pm. He has no previous convictions. He is unmarried with two children. He requested the Court to grant him bail in the amount of R10 000,00 which he, his friends and family can raise. At the time of his arrest he had just resigned from Foschini Group and before that he was a consultant at Vodacom from about 5 years.

[24] Under cross-examination by the Public Prosecutor he said the laptop in question was found at the hotel and it belongs to one Ngceba Ncapayi who was busy with an event. That man was staying at the hotel

making preparations for that event. He visited him at the hotel as he is his friend. He says it is for the first time in the bail application hearing for him to hear about the laptop. About his second arrest Appellant said:-

“I wouldn’t want to get into the merit of the case now but which is we didn’t see it on that video footage and what happened is that the owner then called Mr Van Eck and they all said no, they, the policeman said they can’t see the card but they did Mr Van Van Eck apparently ask them that can you please hold him then I will come tomorrow and then see whether I will release the person or not.”

Appellant then closed his case without calling any further evidence.

[25] This appeal is brought in terms of the provisions of section 65 of the Criminal Procedure Act, (the CPA). The provisions relevant here are those of section 65(4) which provides as follows:-

“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.”

These provisions have been considered in a number of cases. See *S v Green & Another* 2006(1) SACR 603 (SCA); *S v Barber* 1979(4) SA 218(D); *S v Gaseb* 2007(1) NR 310 (HC); *S v Faye* 2009(2) SACR 210 (TK); *S v Ali* 2011(1) SACR 34(ECP) and *S v Porthen & Other* 2004(2) SACR 242(C) , to mention a few.

[26] In *S v Barber, supra* , at 220E-H Hefer J, as he then was, remarked as follows:

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly.

Accordingly although this Court may have a different view, it should not substitute its own view for that of the Magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly. Without saying that the magistrate's view was actually the correct one, I have not been persuaded that it is the wrong one."

[27] Binns-Ward AJ remarked as follows, on the above observations, in *S v Porthen and Others*, *supra*, at para 7:-

"There can, with respect, be no quarrel with the correctness of the observations by Hefer J as a general proposition."

The learned Judge remarked further at para 16 with reference to *S v Botha en 'n Ander* 2002(1) SACR 222 (SCA), as follows:-

"In so far as the quoted dictum in *S v Barber* (*supra*) might be amenable to be construed to suggest that the Appellate Court's power to intervene in terms of Section 65(4) of the CPA is strictly confirmed, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of Section 60(11)(a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case *supra*. (See paras [21]- [27] of the judgment. It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the Appellants had not discharged the onus on them in terms of section 60(11)(a) of the CPA. (The fact that the appeal in Botha's case was an appeal from a decision of the bail application by the High Court as the Court of first instance does not affect the principle in issue."

[28] The learned Judge remarked further as follows at para 17 in *S v Porthen and Others*, *supra*;

“.....it is still necessary to be mindful that a bail appeal, including one affected by the provisions of Section 60(11)(a) goes to the question of deprivation of personal liberty. In my view that consideration is a further factor confirming that Section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal Court’s competence to decide that the lower Court’s decision to refuse bail was “wrong.” See Section 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996.”

These views expressed by Binns-Ward AJ were cited with approval in *S v Faye*, *supra*, and I also whole heartedly align myself with them.

- [29] In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schetekat*, *supra* at 782e-h, Kriegler J dealt with the manner in which a Court hearing a bail application is to determine whether or not “interests of justice permit” the release of an accused person on bail as follows:-

“In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the Court is advised to look to the five broad considerations mentioned in paras (a) to (e) of subsection (4), as detailed in the succeeding subsections and it then has to do the final weighing up of factors for and against bail as required by subsection (9) and (10). Subsections (4), (9) and (10) of section 60 should therefore be read as requiring of a Court hearing a bail application to do what Courts had always to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution. In this regard it is well to remember that Section 35(1)(b) itself placed a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrestee therefore does not have a totally untrammelled right to be set free. More pertinently than in the past, a Court is now obliged by subsection 60(2)(c)(3) and (10) to play a proactive role and is, helped by subsection (4) to (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail.”

It is clear in the above quotes that the Court a quo had to weigh up the considerations referred to in subsection(4), (9) and (10) of section 60

and then exercise a value judgment according to all the relevant criteria on the facts placed before it. At the end the Court a quo had to decide the matter by weighing the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody taking into account the factors mentioned in section 60 (9)(a) to (g).

[30] Mr Hattingh, Counsel for the Appellant, has argued that the Magistrate erred in not taking into consideration, adequately or at all and/or the cumulative effect of the facts as set out in sub-paragraphs 4.1 to 4.2.11 of the Notice of Appeal which read as follows:-

- “4.1 That the Appellant presented evidence by way of *viva voce* evidence most of which was not disputed or contradicted by the State;
- 4.2 That there was uncontested evidence before the Court that:
 - 4.2.1 The Appellant has a fixed place of abode at 5344 Kwazakhele, Port Elizabeth;
 - 4.2.2 That he has no previous convictions;
 - 4.2.3 That there are no outstanding cases against him;
 - 4.2.4 That he is able to raise R10 000,00 for bail;
 - 4.2.5 That it was 17H25 (and not within the parcode 18H00 to 06H00 that he should have been at home in terms of the then existing bail conditions) when he was detained at the garage at Forest Hill;
 - 4.2.6 That , if again released on bail, he will comply with the bail conditions and attend his trial;
 - 4.2.7 That he averred that he was not guilty of the alleged offence;
 - 4.2.8 That the State failed to present any evidence regarding the strength of the State’s case against the Appellant pertaining to the new counts allegedly committed since his release on bail.”

[31] He further argued that in order to have come to a just and fair decision on whether or not bail should have been granted, the Magistrate needed to peruse, interpret and factually analyse the circumstances as set out in section 60(4)(a) to (e) together with section 60(5), 60(6); 60(7), 60(8), 60(8A) and 60(9) of the CPA and in doing so, needed to consider all the evidence presented to the Court.

[32] The argument by Mr Hattingh in para 30 above is supported by the decided cases I have referred to above and I fully agree with him in that respect.

[33] The reasons for refusing bail appear to be contained on page 27 of the record , being the last paragraph of his judgment , reading as follows:-

“I am satisfied that it is not in the interests of justice or the community that the accused be released on bail again. I am satisfied that the Court cannot set any bail condition or that the accused can afford any amount that will safeguard and guarantee the fact that they do not commit further offences or that they will stand their trial. Furthermore I keep in mind that the trial date is within two months now. On that basis I am satisfied that the rights of the accused should give way to the rights of the community and the rights to justice, ON THAT BASIS BAIL IS REFUSED.”

[34] Adv De Villiers, Counsel for the Respondent, has argued that the State has led sufficient evidence to show that the Appellant has propensity to commit crimes of the nature he is charged of. He argued that it is not in the interests of justice to admit the Appellant to bail.

[35] From the evidence on record there is no evidence:

- (i) showing a likelihood that the Appellant , if he were released on bail, he will endanger the safety of the public or any particular person;
- (ii) showing a likelihood that the Appellant, if he were released on bail, will attempt to influence or intimidate witnesses or Counsel

or destroy evidence;

- iv) showing a likelihood that the Appellant , if he were released on bail , will attempt to evade his trial.

The investigating officer Kevin Wayne Godfrey makes the following statement on page 2 line 24 of the record:-

“It is obvious that these guys are at risk for flight” but he does not disclose the factual basis for this. In my view, that allegation without a factual basis cannot be accepted as a good reason to refuse bail in this matter and to do so would be merely relying on the *ipse dixit* of this witness. ”

I can also find no factual basis for the finding of the Magistrate that the Appellant will not stand his trial.

[36] I now turn to the question whether there is evidence showing a likelihood that the Appellant if he were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system including the bail system. This is provided for in section 60(4)(d), read with section 60(8).

In terms of section 60(8)(c) in determining the issue raised by section 60(4)(d) the Court may also take into account any previous failure on the part of the accused to comply with bail conditions. In *casu* one of the reasons advanced by the State in objecting to the grant of bail to the Appellant is his failure to comply with a bail condition that he does not leave his house between 6H00 and 18H00. Appellant denies this saying he was arrested at the garage in question before 18h00. While cross-examining the State witness K W Godfrey , Mr Bence, legal representative for the Appellant, put his question as follows:-

“My instructions are that it was before six o’clock at night even that showed on the video, according to my instructions.”

From this statement one would expect that when Appellant testified he would confirm that the time when he was arrested while out on bail showed on the video was before 18H00. His evidence on this point goes as follows:-

“Q. Is there a time on the video footage:

A. That point in time “yes” there was a time on the video footage;

Q. What was the time shown on the video footage according to your reflection?

A. It was during the day because you could see the sun during the day?

I cannot understand, if the time was showing on the video footage and Appellant noticed it, why he does not state the time at which he was arrested. I also cannot understand why the investigating officer had not taken particular note of the time at which the Appellant flouted the bail condition by not being at his home between 6H00 and 18H00 as shown on the video footage and also the time at which Appellant committed the later offences.

In my view, the contents of that video footage could have assisted the Court a quo in this bail application but no application was made to the Court a quo for it to be played in Court. On page 5 line 20 Mr Bence stated that he had not seen the video footage. This is the video footage Appellant says it shows the time at which he is alleged to have flouted the bail condition to be in his house between 06H00 and 18h00. The video footage would have shown the Appellant committing or not committing the offence in question. In *S v Green, supra*, where the Court hearing the bail application had refused an application by the attorney of the accused to show a video film of the incident taken by the closed circuit television camera, the Court found that the Magistrate should have granted the application and it then ordered the State to grant the defence an access to the video tapes.

As stated by Kriegler J in *S v Dlamini, supra*, (at para 11) “a bail hearing is a unique judicial function” and “the inquisitorial powers of the presiding officer are greater,” in my view, the presiding officer in the Court a quo could have played a more active role in respect of the video footage evidence.

This issue is related to the one discussed in para 37 hereinafter.

[37] The Court had also to consider whether there is likelihood that the

Appellant, if he released on bail will commit a schedule 1 offence.

The Appellant was out on bail in respect of schedule 1 offences and while out on bail he was arrested for allegedly committing a similar offence which is a schedule 1 offence (See Section 60(4)(a)). Section 60(5)(e) provides that in considering whether the ground in subsection 4(a) has been established the Court may, where applicable, taking into account any disposition of the Accused to commit offences referred to in Schedule 1, as evident from his past conduct.

From the record the Appellant does not deny to have been on the scene of the commission of this later offence at the time of its alleged commission. He only denies that he committed the offence. He says the video footage does not show him committing this offence. He also does not deny that a laptop was found in his possession which the State states was used in connection with the commission of these crimes. He states that the laptop belongs to his friend and was found in his friend's bedroom in a hotel. There is no evidence from his friend disassociating the Appellant with the laptop. In my view that aspect invites an explanation from the Appellant. The factors in paragraph 37 above and this paragraph, in my view, are the most that hit the Appellant in this bail application.

[38] Mr Hattingh also argued that the Magistrate took into account that neither of them can afford bail and refused bail, inter alia, because Appellant cannot afford an amount of bail of such nature that it will serve guarantee. He stated that the Appellant testified that he can raise plus minus R10 000,00. He contended that if the Magistrate considered a higher amount he should have disclosed it and establish whether the Appellant with the assistance of others cannot raise it. I fully agree with Mr Hatingh in this respect.

[39] Mr Hattingh also raises the question of the strength of the state case. He argued that the State case is weak and the State failed to gainsay the Appellant's observations in respect thereof. In the light of my remarks in paragraph 37 above the case of the State,

in my view, cannot be described as so weak so as to entitle the Appellant to be released on bail on that ground alone. At this stage the enquiry is not really concerned with the guilt only of the Appellant, but with the possible guilt of the Appellant only to the extent it may bear on where the interests of justice lie in regard to bail (See *S v Dlamini*, supra, at para 11)

I consequently do not agree with Mr Hattingh in this respect.

- [40] The Magistrate also stated as a reason for refusal of bail, that the trial date “is within two months from now”. Mr Hattingh argued that, that was a serious misdirection as it can never count against the granting of bail that an Appellant only has to sit awaiting trial for another two months.

Section 60(9) provides that in considering the question in sub-section (4) the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody taking into account, where applicable, some factors one of which are:-

- “(a) the period of which the accused has already been in custody since his 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.”

In my view the Magistrate was correct in law in taking that into account.

- [41] The Magistrate did not maliciously analyse the circumstances as set out in section 60(4)(a)-(e) together with section 60(5), 60(6), 60(7), 60(8A) and 60(9) of the CPA. However at the end of the enquiry he came to the conclusion that it is not in the interest of justice that the Appellant be released on bail.

- [42] Reverting to question of onus discussed above, I fully agree with the remarks by the Magistrate quoted in para 15 above that nothing really

turned on that at the end but I re-state the following warning given by Binns-Wards AJ in *S v Porthen*, *supra* at para 60:

“.....Magistrates and prosecutors should be careful to ensure that the legislature’s intent is not subverted by allowing section 60(11)(a) bail applications to proceed in a way incongruent with the relevant provisions of the Act.”

[43] In my view I am satisfied that the Magistrate in the Court *a quo* was not wrong in his decision finding that the interests of justice do not permit the release of the Appellant on bail.

[44] In the circumstances the appeal is hereby dismissed.

D. Z. DUKADA

ACTING JUDGE OF THE HIGH COURT

Appearance:

Adv A Hattingh : Counsel for Appellant
Instructed by Attorneys
S. B. MAQUNGU

Adv De Villiers : Counsel for Respondent
Office of Deputy Director of
Public Prosecutions

PORT ELIZABETH

Date Heard : 1st MARCH 2012-
Date Delivered : 17th APRIL 2012