

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No.: 2232/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the *ex parte* application between:

JOHAN DAVID REYNEKE

Applicant

In re

THE STATE

versus

THABO HENDRIK MOKOENA¹

Coram: Opperman, J

Date of hearing: 19 May 2022

Order: 24 May 2022

Reasons for Judgment: The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 24 May 2022. The date and time for hand-down is deemed to be 24 May 2022 at 15h00.

¹ "Mr. Mokoena" & "the accused".

Summary: Application for leave to appeal - Habeas Corpus - legality of incarceration of accused following the refusal of release in terms of the Criminal Procedure Act 51 of 1977 but after discharge from hospital following an order in terms of section 47(6)² of the Mental Health Care Act 17 of 2002.

JUDGMENT

[1] The matter that lies for adjudication is an application for leave to appeal an order refusing “that the accused be released immediately in terms of the principles of the *interdictum de libero homine exhibendo* or *habeas corpus*.”³

[2] The release is demanded notwithstanding the clear travesty of justice that caused an erroneous order for the accused admittance to the hospital when he was referred as a State Patient, also when he was ordered to be discharged from hospital in terms of the Mental Health Care Act 17 of 2002 and the fact that he was never ordered to be released from custody in terms of the Criminal Procedure Act 51 of 1977.

[3] After an urgent application I ruled and ordered as follows:

² Section 47(6) On considering the application, the judge in chambers may order that the State patient—

- (a) remain a state patient;
- (b) be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user in terms of Chapter V;
- (c) be discharged unconditionally; or
- (d) be discharged conditionally.

³ Kruger, A; *Hiemstra's Criminal Procedure*, Chapter 5 Arrest, Section 50 Procedure after arrest, last updated: February 2022 - SI 15 correctly found that Section 35(2)(d) of the Constitution now gives detained persons the right “to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released”. “Even without the purposive interpretation which is permissible with constitutional provisions, this provision is an unambiguous confirmation of the *habeas corpus* idea. It is also significant that the provision addresses both procedural and substantive aspects. In actual fact C 35(2)(d) completely obviates the common-law and statutory provisions; but it is nevertheless [Page 5–32] useful to take note of the pre- and extra-constitutional aspects. Furthermore, as to procedure, there are several precedents in the previous jurisprudence.” (Accentuation added) Compare *Habeas corpus as a remedy for deprivation of the right to personal liberty: contemporary developments in Canada and South Africa* by Chuks Okpaluba & Anthony O. Nwafor, *The International Journal of Human Rights*, 23:10, 1594-1614, DOI: 10.1080/13642987.2019.1624534 To link to this article: <https://doi.org/10.1080/13642987.2019.1624534>.

[25] To summarise:

1. The Order for Discharge in terms of the Mental Health Care Act 17 of 2002 of 30 March 2022 was irregular due to a lack of relevant information submitted in the application and thus illegal;
2. The accused was in custody after lawful arrest and a proper bail application that refused his release and this in terms of the Criminal Procedure Act 51 of 1977;
3. Discharge from hospital in terms of the Mental Health Care Act does not permit release from custody in terms of the Criminal Procedure Act.
4. The incarceration of the accused is lawful. The release of the accused will be unlawful.

[26] **ORDER**

After judicial consideration of the facts and the applicable law, having heard the arguments of the applicant and the representative of the Office of the Director of Public Prosecutions: Free State and with regard to the papers filed the following order is made:

1. The application is dismissed.
2. No order is made as to costs.
3. The record of the application as well as the consequent bail application must be transcribed and referred to the Director of Public Prosecutions: Free State in order for pro-active measures to be declared in the form of directives to all parties to prevent a repeat of this situation.

[4] In 1928,⁴ 94 years ago, Curlewis, JA supported by Solomon, CJ and Wessels, JA stated in the Supreme Court of Appeal on page 277 that:

By the words "just decision of the case" I understand the Legislature to mean to do justice as between the prosecution and the accused. **A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.** I do not think that a narrow or restricted interpretation should be put on sec. 247. Many provisions of Act 31 of 1917, for instance those relating to the amendment of indictments, tend to indicate that the Legislature intended to do away with technicalities and formalities and **to place criminal trials on such a footing that an accused person shall not escape, as in the past, merely by reason of some technicality or mistake.** The intention of sec. 247 seems to me to give a judge in a criminal trial wide discretion and power in the conduct of the proceedings, **so that an innocent person be not convicted or a guilty person get free by reason, *inter alia*, of some omission, mistake or technicality.** (Accentuation added)

"It appears to me that the increasing tendency of Courts of Justice is to get away from technicalities as much as possible. There is of course great danger in stretching that tendency too far, and in many cases, it is somewhat difficult to distinguish between a matter of technicality and a matter of substance. But I think that the decision turns on the wording of the section coupled with the facts of this particular case.... **After all a criminal trial is not a game. There was an oversight on the part of the Crown, and it seems to me to have been a very venial oversight,** because there was nothing in the

conduct of the case up to that stage to indicate that the use of the words charged in the indictment would be contested, and in fact the whole conduct of the case had been put on the assumption that those words were used. **I think it would be making a farce of the proceedings** if I did not allow evidence to be called to clear up this point." (At page 267) (Accentuation added)

[5] In *Lethoko and another v Minister of Defence and others* 2021 (2) SACR 661 (FB) I reiterated that:

[32] ...**A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals must not cause the rule of law to fail the country.** (Accentuation added)

[6] Section 7 of the Constitution of the Republic of South Africa, 1996 decrees that:

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

(Accentuation added)

[7] The right to freedom is not absolute and unqualified.

Section 35 of the Constitution: Arrested, detained and accused persons. —

(1) Everyone who is arrested for allegedly committing an offence has the right—

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable condition. (Accentuation added)

Section 36 of the Constitution:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[8] It is not the law of this country; and will never be, to release a man without any judicial oversight from custody “immediately” into society in the following circumstances:

1. He has numerous and some serious previous convictions (the investigating officer referred to him as a ‘career criminal’ when he testified in May 2022);

2. he was arrested for the case on which he is in custody after release on parole;
3. he attempted to evade arrest by the use of alias's;
4. his family circumstances are unstable (to the extent that the investigating officer referred to them as a family that has a tendency to commit crime and that was surprised to learn that the youngest brother was released from prison);
5. he stands trial on serious offences that include the murder of an 87-year-old man that died of "intracranial haemorrhage due to blunt force trauma to his face" and housebreaking with the intent to rob and robbery with aggravating circumstances;
6. he suffers from mental afflictions described as: "Psychotic Disorder Unspecified & Cannabis Use Disorder" that is controlled by medication and therapy. (His abuse of harmful substances apparently caused his condition);
7. he admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 during the trial that is now partly heard, that:
 - a. On the morning of 27 February 2016, I was at a Tavern called Ma-China in Sasolburg. I was in the company of Accused 2 and we were drinking. At the time I've known Accused 2 for about two months, him being a seller of facial products.
 - b. Whilst drinking, we ran out of money and Accused 2 indicated that he knows a house where we could break in to look for money and/or valuables. Accused 2 explained that he knows the house as it is not far from the house he stayed at and that he also knows that the owner would hand bread to the needy. I agreed and we went to the house situated at [...] J [...]1 S [...] Street Sasolburg. At the time I did not know that the house belonged to P [...] J [...]2 S [...]. On the way I picked up an iron rod to break a door or window open to gain entrance.
 - c. We arrived at the house at about 10:00 the morning. We saw that the doors and security doors leading into the house stood open, thus I had no need for the iron rod. Upon entering the house, we went to the lounge. There I took a laptop, DVD writer, a cellphone, portable radio and

blue jacket. Accused 2 took a colour printer machine, also from the lounge. We put all these things inside a duvet that we took from one of the bedrooms so to carry it in.

d. At leaving the house, we entered the garage too. There I took a saw and metal scissors. At about 10:30 we departed for my parental home at Zamdela, using a taxi that we found near Checkers. We left the items at my parental home and went looking for buyers. Accused 2 was present when I found a buyer for the laptop. We returned to my parental home to fetch the laptop so to hand it over to the buyer, now known as Victor Mashegoane Malome. I sold the laptop and the DVD writer for R400 and divided the money between Accused 2 and myself so to buy beer with it. At the New Dawn Pawnshop, I sold the metal scissors and a wood saw to Mrs. Oberholtzer for R30. Accused 2 was not present at the time.

e. On Monday, 29 February 2016, I sold the portable radio to one Mlamuli Jetros Luthuli for R70. Accused 2 was not present at the time. I used the stolen phone of P [...] J [...]2 S [...] for some time, later replacing its simcard with my own. I later sold it to a Nigerian man for R200.

f. After my arrest, I assisted the police in tracing Accused 2 and handing over the items I have stolen from the house of P [...] J [...]2 S [...].

g. I do not dispute the findings, correctness and conclusions made in the following documents:

- i. The identity of the Deceased being P [...] J [...]2 S [...];
- ii. The post mortem report done by Dr. DFH Humphris;
- iii. The photos taken at the scene and during the post mortem;
- iv. An Identification Parade, held on 6 May 2016, where I was pointed by Mrs. Oberholtzer as the seller at the new Dawn Pawnshop.

I beg forgiveness and mercy from the Court with sentence, as I am sorry for what I have done. I accept the consequences for my acts.

[9] The facts and the law that brought the matter before this court and that is now an application for leave to appeal, is vital.

1. On 6 May 2022 the file was allocated to me by the Acting Judge President.
2. Both counsel for the State and the accused met with me in Chambers and informed that the matter is for postponement and that they are agreed that the accused must be released on warning. The postponement was for the original Presiding Officer in front of whom the matter is partly heard, to be located and to inquire as to his availability for the trial to continue. The trial is at its end according to counsel.
3. Imperative is the fact that the Presiding Officer was acting as a Judge at the stage of the trial and when the accused was referred as a State Patient. He neglected to issue a warrant that would cause the continued incarceration from the hospital after the discharge of the accused from hospital. This was a *bona fide* mistake.
4. Imperative is the fact that the accused was in custody since his arrest and up until his referral as State Patient. The only manner in which he could have been so incarcerated is if his release was refused by a Court. This is now from 2016 to 2018.
5. The ground of appeal at 1.1 that no evidence was led as to the refusal of bail for the accused following his arrest is wrong. The very same counsel that acted for the accused during the trial is the legal practitioner that brings this application. It is common cause that the accused was in custody for years before he was referred as a State Patient and the only way for this to could have happened was if a court so ordered. Counsel for the accused knows well

that release was refused for him and never raised any point to the opposite when the matter landed before me and when we started with a bail application.

6. The events that followed before the matter came to me was that the Free State Psychiatric Complex did not release the accused after the Order of the Judge in Chambers in terms of section 47 of the Mental Health Care Act. It is not clear if he was held at the hospital or at Grootvlei Prison before he was brought to court on 3 May 2022.

7. The Judge President remanded the matter on 3 May 2022 for the issue of the Presiding Officer to be clarified and ordered the accused to remain in custody. Counsel for the accused was also not available. It is clear that the Free State Psychiatric Complex realised that the discharge from hospital does not automatically justify the release from custody.

8. The remand was to 6 May 2022 when the matter first appeared before me. Notwithstanding the decision between counsel for the State and the accused that he be released, did I indicate that I am not willing to release the accused before all the factors that lead to his incarceration is placed before me and that I am satisfied that he may be, constitutionally so, released.

9. Counsel indicated that the application for release is in terms of section 48G (3) of Act 111 of 1998. In principle, no person should be detained awaiting trial for longer than two years. Section 49G (1) and (3) of Act 111 of 1998 provides:

(1) The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned in the manner set out in this section: Provided that no remand detainee shall be brought before a court in terms of this section if such remand detainee had appeared before a court three months immediately prior to the expiry of such two year period and the court during that appearance considered the continued detention of such detainee.

(3) Any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the Head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under conditions appropriate to the case.

10. The court dealing with an application under section 49G (3) must take into account:

- (a) the probable period of time the trial is still to endure until finalization;
- (b) the reasons predicated any delay in the prosecution and finalization of the trial;
- (c) the nature and the gravity of the charges the applicants are facing;
- (d) the strength of the case against the applicants and the probability that the applicants as a consequence thereof may attempt to flee or evade to stand their trial; and
- (e) the severity of the sentence likely to be imposed should the applicants be convicted.

11. The hearing under section 49G (3) is not in the nature of a bail hearing.⁵

12. I ruled that since the situation is *sui generis* in that the accused was incarcerated as a State Patient and his case served before a Judge in Chambers on 30 March 2022 and in court on 3 May 2022; that a formal bail application must serve before me and not an application in terms of section 49G of the Correctional Service Act. Counsel for the State as well as the accused were in agreement that the bail application will be in terms of schedule 6 of the CPA.

13. The bail application commenced and the accused/applicant testified, his brother testified and the investigating officer. Strangely enough

⁵ *S v Dithlakanyane and Others* 2015 (1) SACR 437 (GJ) at paragraph [49] and *S v Matshoba and Others* 2015 (1) SACR 448 (ECP) at paragraph [6]. Section 49G was put into operation by Proclamation 21 of 2013 with effect from 1 July 2013 (GG 36621 of 1 July 2013).

were the previous convictions not placed before the court as is decreed in the CPA until the court started to inquire about it; neither counsel for the State nor the accused adduced evidence on this. The previous convictions of the accused turned out to be extensive. The State did not oppose the bail application and closed the case for the State.

14. During an adjournment and after the court indicated that it wanted to call the psychiatrist that attended to the case of the accused; counsel for the accused indicated in Chambers that they wanted for the bail application to be suspended to bring the application in terms of the principles of the *interdictum de libero homine exhibendo* or *habeas corpus*.

15. I indicated to counsel for the State that she must *laissez* with her senior because the fact that she did not oppose the release of the accused was of concern.

16. Even though the application served *ex parte* before me the applicant saw it fit to serve it on the Office of the Public Prosecutor: Free State. He maintains that it was out of courtesy; this is not correct. The State has a real interest in the matter. Although the application for leave to appeal state it as an irregularity that the court granted the State the opportunity to address it during the application, he did not fault the Notice to Abide by the State. The senior to the State Advocate that filed the Notice to Abide; vehemently argued against the release of the accused and indicated that the accused will be arrested immediately if released. They just did not have a warrant ready on the date of the application that was 16 May 2022.

17. Even if the involvement of the State, as was allowed by the court, is an irregularity, which it cannot be in the circumstances of the case; the facts and law demand the continued incarceration of the accused until the finalisation of the bail application.

[10] This was my judgment on the application:

[1] This is an urgent application “that the accused be released immediately in terms of the principles of the *interdictum de libero homine exhibendo* or *habeas corpus*”.

[2] It is alleged that the accused was unlawfully held in custody from 30 March 2022 to date.

[3] The *interdictum de libero homine exhibendo* is an important writ in constitutional law and must be afforded a swift remedy in all cases of illegal restraint or confinement. It was therefore ordered that the Uniform Rules relating to service and process are dispensed with and it was directed that the motion be heard on an urgent basis in terms of the provisions of Uniform Rule 6(12).

[4] The facts and circumstances of the case are *sui generis* and definitely not as straight forward as it would seem at first glance.

[5] In *Lethoko and another v Minister of Defence and others* 2021 (2) SACR 661 (FB) I ruled that:

[32] ...A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals must not cause the rule of law to fail the country.

[6] The matter *in casu* is an example of human errors that shamed the administration of justice; this is true for all the parties involved. The administration to ensure the proper handling of the case was not done.

[7] The accused was arrested on 4 May 2016. After an unsuccessful application for bail, he remained in custody pending the finalization of the trial.

[8] It would appear that bail was refused due to his previous convictions, the manner in which he attempted to evade arrest by the use of alias's, his unstable family circumstances, the seriousness of the crime and the strength of the case.

[9] On 3 September 2018 the court ordered a separation of trials in terms of section 157(2) of the Criminal Procedure Act 51 of 1977 ("CPA") between the accused ("Accused 1") and his co-accused. The accused was declared a State Patient in terms of Chapter 13 of the CPA due to his incapacity to understand the proceedings. The diagnosis was Psychotic Disorder Unspecified & Cannabis Use Disorder. His abuse of harmful substances apparently caused his condition. He was ruled to, at the time of the alleged crime, had the ability to distinguish between right and wrong and to control his actions accordingly.

[10] The order of 3 September 2018 reads as follows:

1. Accused 1 is declared a State Patient in terms of Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977, as amended.
2. Accused 1 is referred to the Free State Psychiatric Complex Bloemfontein for admission and treatment and be kept there until an order is granted by a Judge in Chambers on Application.
3. The trial of Accused 1 is separated from that of Accused 2 in terms of section 157(2) of the Criminal Procedure Act 51 of 1977, as amended.
4. Accused 2 is to continue to stand trial under case number 12/2017.

[11] The court *a quo* neglected to order the continued incarceration of the accused after his discharge from the Free State Psychiatric Complex. The court *a quo* also neglected to issue a warrant to the Free State Psychiatric Complex that makes provision for the accused to be transferred to a prison after discharge from the hospital. It is an administrative action and order that would ensure the administrative and formal legality of the incarceration of the accused.

[12] The above did not affect the *ex lege* reality that the accused was to be held in custody pending the finalisation of the trial in terms of the CPA.

[13] There is an important and crucial distinction to be made between the discharge of an accused from the hospital and his release from custody and prison after arrest. The discharge of an accused from the hospital is just that and not from custody in terms of Chapters 5, 9 or 10 of the CPA. His incarceration will continue and perpetuate until he is released by a court in terms of the CPA.

[14] The Free State Psychiatric Complex acted legally sound and correct when they apparently transferred the accused to the Grootvlei Prison after the Order of the Judge in Chambers on 30 March 2022 for his conditional release in terms of the Mental Health Care Act 17 of 2002. They discharged him from hospital as they had the legal capacity to do but, not from the custody of the police as they had no authority to do.

[15] “Accused 1 is referred to the Free State Psychiatric Complex Bloemfontein for admission and treatment and be kept there until an order is granted by a Judge in Chambers on Application” assumes a legal court order made after due cognisance of all the relevant factors.

[16] The Order by the Judge in Chambers on 30 March 2022 was irregular. The Order by the Judge in Chambers for the conditional release of the accused from the Free State Psychiatric Complex, first of all, did not order the release from custody in terms of the CPA, secondly was the fact that the accused was in custody pending the finalisation of the trial not brought to the attention of the Judge in Chambers and thirdly was the history and reason for the refusal of bail not known to the Judge in Chambers. If that was the case, the incarceration of the accused would have been ordered. This does not distract from the fact that even though the administrative “paper-work” was apparently not available, the accused was lawfully and *ex lege* in custody.

[17] The travesty of justice lies in the fact that a man that was described by the investigating officer in this case as a “career criminal” coming from a family that is known for their criminal activities, was released by the Free State Psychiatric Complex on two stints into the community even though he was in custody for murder and robbery with aggravating circumstances. His previous convictions depicted on the so-called SAP 69-document were available in the docket that was made known to the authorities at the Free State Psychiatric Complex and the Director of Public Prosecutions when his conditional release was recommended on 28 March 2022. The previous convictions are extensive and includes violence. It had to form part of the application in Chambers for the release of the accused. This, as well as the fact that bail was refused for the accused and that he was *ex lege* the CPA in custody. The Notice to Abide by the Office of the Director of Public Prosecutions, filed in this application, is of grave concern.

[18] Notwithstanding the release in terms of section 47 of the Mental Health Care Act 17 of 2002 was the accused in custody in terms of the CPA and would any release after the Order of the Judge in Chambers have been unlawful.

[19] It is therefore not a question whether the accused is unlawfully in custody; it is a matter of the accused being unlawfully released on the application that now lies before the court. Or for that matter, by any of the other authorities beforehand and that include the Free State Psychiatric Complex, the Grootvlei Prison and the South African Police Service.

[20] His incarceration from 30 March 2022 until his first appearance in court on 3 May 2022 was thus lawful. The lawfulness was confirmed by the court that remanded the matter and ordered the accused to remain in custody on 3 May 2022. The same is true for the subsequent appearances and remands in custody.

[21] He stands accused of the most serious offences being: Count 1: Robbery with aggravating circumstances as in section 1 of the CPA and Count 2: Murder. The law does not prevent a bail application on new facts caused by the changed circumstances of the accused. Hence the bail application pending before this court. There is no prejudice to the accused and the justice system dealt with him correctly but administratively awkwardly. The summary release of the accused just because there apparently is not and was not a warrant will bring the administration of justice into disrepute.

[22] The facts and questions in law of the cases on which the applicant relies is different from this case. In *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC) the issue was:

[46] Even if Isaacs stands for the proposition that a remand order by a magistrate necessarily renders the subsequent detention lawful, how does this impact the liability of the police for unlawfully arresting and factually causing the subsequent detention? Put differently,

assuming that a magistrate does remand someone lawfully, would it necessarily follow that the police cannot be liable for the subsequent detention factually caused by an unlawful arrest? What difference would it make if the remand was unlawful?

In casu the accused was to remain in custody after a proper and effective bail application was refused. The discharge from a hospital does not cause the release of the accused ordered in terms of the Criminal Procedure Act. The arrest of the accused in 2016 was lawful to begin with.

[23] I align myself with the finding at paragraph [62]:

The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made. (Accentuation added)

[24] The facts and findings in *Minister of Police and Another v Muller* 2020 (1) SACR 432 (SCA) are also different but support the finding in this case. The continued incarceration of the accused was justified:

[36] The magistrate, in considering whether to release Muller, accordingly enquired into his previous convictions. Thus, it emerged that he had previously been convicted of rape. By virtue of the

formulation of sch 5 to the CPA, the admitted previous conviction, in the opinion of the magistrate, elevated the offence of which he was charged to a sch 5 offence. Section 60(11)(b) of the CPA provides that, where accused persons have been charged with an offence referred to in sch 5 (but not in sch 6) they shall be detained in custody until they are dealt with in accordance with law, unless they, having been given a reasonable opportunity to do so, adduce evidence which satisfies the court that the interests of justice permit their release. In the circumstances it placed an onus on Muller to adduce evidence to satisfy the court, on a balance of probability, that the interests of justice permitted his release.

[37] The presiding magistrate ruled that a formal bail application would have to be heard in the bail court in order for Muller to adduce such evidence. Despite the best endeavours of the court prosecutor, the bail court was unable to determine the matter on 28 November 2013. In these circumstances the magistrate postponed the matter and ordered Muller's further detention until 2 December 2013, which was the first occasion that the bail application could be entertained.

[38] In summary, the decision taken to prosecute Muller was taken by the screen prosecutor. She had before her all the relevant information to do so. At the first appearance the magistrate gave judicial consideration to Muller's release and remanded him in custody. That she was obliged to do in terms of s 60(11)(b) of the CPA. Neither the prosecutor nor the police had knowledge of Muller's previous conviction and accordingly could not have foreseen that he would be remanded in custody.

[39] In the circumstances the liability of the police for the wrongful and unlawful arrest and detention was truncated, upon the remand order made at the first appearance. The appeal must therefore succeed in respect of the further detention.

[11] The above brings me to the question as of the appealability of the matter. This is the test:

1. I do not agree that the bar was raised with the promulgation of the Superior Courts Act 10 of 2013.⁶
2. The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.
3. Historically the rule was: “In that reasonable prospect exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusions on the facts and the law.”⁷
4. The words “would” and “only” in the current legislation caused some to view that the bar for granting leave to appeal has been raised.⁸ All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another Court would come to another conclusion.⁹

⁶ *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021).

⁷ *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

⁸ *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd 2021 JDR 0273 (FB).

⁹ 17. Leave to appeal. —

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
 - (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

5. The final word was spoken recently in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

6. The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*¹⁰

[12] There does not exist a reasonable chance to succeed on appeal and that another court would come to another conclusion on the *sui generis* facts of this case. Counsel for the accused must give serious consideration for the bail application, that is partly heard, to proceed. The finalisation of the main trial must be expedited.

[13] ORDER

1. The application for leave to appeal is dismissed.
2. No order is made as to costs.

M OPPERMAN, J

JD REYNEKE

ATTORNEY FOR THE APPLICANT

Legal Aid SA: Bloemfontein
4th Floor, Fedsure Building
49 Charlotte Maxeke Street
Bloemfontein

THE DIRECTOR OF PUBLIC PROSECUTIONS

BLOEMFONTEIN: FREE STATE

¹⁰ *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC).