



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)**

Case No: CA & R 29/21

In the matter between:

SURETHA BRITS

Appellant

and

THE STATE

Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an appeal against the refusal of bail by the Magistrate's Court for the District of Namaqualand, held at Pofadder. The appellant has been charged with *inter alia* pre-meditated murder in circumstances which amount to the contract killing of her erstwhile husband.

2. The Acting Director of Public Prosecutions in the Northern Cape issued the certificate contemplated in section 60 (11A)(a) of the Criminal Procedure Act¹ (the Act) stating that the charges the appellant faced were charges listed in Schedule 6 of the Act. This certificate was handed in as Exhibit "A" in the court *a quo*. It was not in dispute in the court *a quo*, and it was also not placed in issue in the present appeal, that the provisions of s60(11)(a) of the Act had to be complied with in assessing whether the appellant was to be admitted to bail or not.
3. The provisions of s60(11)(a) of the Act read as follows:

"60(11) Notwithstanding any provision of this Act, where an accused is charged with any offence referred to-

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release; ..."
4. In the court *a quo*, the appellant gave *viva voce* evidence. The appellant had legal representation in the court *a quo*. The transcript of the proceedings in the court *a quo* shows that the appellant chose not to deal with the merits of the case against her. Although a fair representation of the evidence against her was put to her in cross-

¹ Act 51 of 1977.

examination, she, on legal advice, chose not to deal with the merits of such evidence.

5. In her evidence in chief, the appellant adduced evidence on three broad grounds, relating to her personal circumstances, on which she sought to satisfy the court *a quo* constituted exceptional circumstances that the interests of justice permitted her release on bail.
6. In short, the appellant sought to rely on her personal circumstances in her efforts to adduce evidence to convince the court *a quo* that the required 'exceptional circumstances' existed that the interests of justice permitted her release on bail. The three grounds relied upon by the appellant were: Firstly, her state of health and the steps required to ensure her well-being; Secondly, her and the estate of the deceased's business interests; and Thirdly, the physical, material and emotional well being of her three children.
7. After a creditable display of the art of cross-examination Mr Cloete, who also appeared for the State in the court *a quo*, had the appellant concede that there was nothing that was immediately life threatening in her state of health. Further, that her current health needs could and had been properly managed whilst in custody.

8. In respect of appellant's and the deceased's business interests, appellant had conceded in cross-examination that she had closed down her business SSS Suppliers several months before her arrest. Also, that the farm had been rented out and would bring in a steady rental income and consequently did not need management. In respect of the hotel and accommodation business it was submitted that there were employees that knew their jobs and that a manager could run the hotel and accommodation business. Appellant also conceded that the properties that belonged to her erstwhile husband fell into his estate and that she could not in any event make decisions that would relate to such properties and that such decisions fell to be taken by an executor in the estate.
9. In regard to her children, the appellant conceded that their material and financial needs were taken care of. Only their emotional well being was placed in contention.
10. The position as to when a court in dealing with a bail appeal may intervene and set aside the decision of a lower court is set out in section 65(4) of the Act². The relevant sub-section reads as follows:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court 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."

² Criminal Procedure Act, above.

11. How this section is to be interpreted and applied has created something of a controversy. In *S v PORTHEN*³ Binns-Ward AJ (as he then was) considers the classic interpretation set out by Hefer J in *S v BARBER*⁴. Binns-Ward AJ concludes that an appeal court in a bail appeal is not as constrained as is set out in the *dicta* of Hefer J in Barber's case.
12. Binns-Ward AJ argues that it is necessary to determine whether the discretion afforded to the lower court under the provisions of s60(11)(a) is a discretion in the wide sense of the word or if it is a discretion in the narrow sense. Binns-Ward AJ concludes that it is indeed a discretion in the wide sense that is exercised. Accordingly, an appellate court can "...interfere with the lower court's decision of a bail application if it is satisfied that the lower court's *decision* is wrong."⁵
13. It is important to note that Binns-Ward AJ was careful to point out that "Before embarking on that determination I should, however, say that even when a discretion in the wider sense is exercised by the court *a quo*, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first

³ 2004 (2) SACR 242 (C) at paras [8], [9], [10], [11], [12] and [14].

⁴ 1979 (4) SA 218 (D) at 220 E-G.

⁵ Porthen., above at para [14].

instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong. That is the *dicta* quoted from Barber's case, quoted above."⁶

14. Mr Cloete who appeared for the respondent in this matter argued that the *dicta* in Barber's case⁷ meant that the appellant had to show that the learned magistrate in the court a quo exercised her discretion on either the facts or the law on an incorrect or wrong basis.
15. Mr Cloete then submitted that Porthen and Barber were reconcilable because both had been cited with approval in *S v FAYE*⁸.
16. In my view Mr Cloete has misread both Porthen's case and Faye's case. In respect of what is required to be established in a bail appeal Binns-Ward AJ in Porthen said: "Insofar 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 s65(4) of the CPA is strictly confined, 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 a construction on the subsection;..."⁹

⁶ Porthen., above at para [11].

⁷ Barber., above at 220 E-G.

⁸ 2009 (2) SACR 210 (Tk)

⁹ Porthen., above at para [16].

17. In *S v Faye Petse* ADJP the Acting Deputy Judge President clearly aligns himself with the approach taken by Binns-Ward AJ in Porthen's case¹⁰.
18. Then the next step is to determine whether in the court *a quo* the appellant discharged the onus of establishing that exceptional circumstances existed which in the interests of justice permitted her release on bail.
19. The standard of proof required in discharging the aforesaid onus is the normal civil onus, that is proof established on a balance of probabilities.
20. The concept of 'exceptional circumstances' has not been defined in the act. The concept has been traversed in a number of cases. In *Killian v S*¹¹ Binns-Ward J stated:
- "The import of the 'exceptional circumstances' test has been traversed in a number of judgements. In *S v Jonas* 1998 (2) SACR 677 (SE) at 678E-G it was held that the term does not posit a closed list of circumstances. Whether a court may be satisfied that exceptional circumstances exist depends on the facts on the facts and circumstances established in the given application. Whereas 'exceptional' denotes something 'unusual, extraordinary, remarkable, peculiar or simply different' (see e.g. *S v Petersen* 2008 (2) SACR 355 (C) at para [55], it has been observed that '(s)howing "exceptional circumstances" for the purposes of s60(11) of the CPA does not posit a standard that would render it impossible for an unexceptional, but deserving applicant to make a case for bail' (*S v Josephs* 2001 (1) SACR 659 (C) at 668I and *S v Viljoen* 2002 (2) SACR 550 (SCA)). They do not have to be circumstances 'over and

¹⁰ *S v Faye*., above at para [13].

¹¹ [2021] ZAWCHC 100 (24 May 2021) at para [4].

beyond and generically different from those enumerated in ss60(4) to (9)', which are circumstances to which regard is had in run of the mill bail applications not subject to the strictures of s60(11). It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary."

21. It is also true that all of the factors normally relevant are examined cumulatively together with any special circumstances or considerations the appellant might raise to determine whether she has established 'exceptional circumstances as contemplated in s60(11) of the Act.¹²

22. The appellant has raised certain issues where it is alleged that the learned magistrate in the court *a quo* may have misdirected herself. In this regard the appellant raised 5 issues, namely:

22.1. She approached the matter from the premise that the appellant had to prove "...exceptional circumstances which 'require' her release on bail whilst s60(11)(a) uses the word 'permit' as opposed to the word require;

22.2. She found that the personal circumstances of the appellant would in any event be the same if she is convicted. In doing so she did not give any, alternatively adequate consideration to the case law that release on bail is a means to giving effect to the presumption of innocence set out in the Constitution (s35(3)(h));

¹² S v H 1999 (1) SACR 72 (W) at 77E.

- 22.3. She questioned the purpose of bail if a person that committed an offence could not be kept in custody;
- 22.4. She criticised the appellant for electing not to answer the State case and argued that the appellant was in law entitled to do so; and
- 22.5. She did not give any, alternatively adequate consideration to the legislation and case law to the effect that the primary objective of bail is to ensure that an accused stands trial and that everyone who is arrested for allegedly committing an offence has the right to be released on bail, subject to reasonable conditions if the interests of justice permit.
23. In oral argument Ms Erasmus who appeared for the appellant submitted that what is set out in 22.5 above is a conclusion that is justified on the basis of the contentions made in paragraphs 22.1, 22.2 and 22.3 above.
24. In dealing with the contention that the learned magistrate in the court *a quo* approached the matter from the starting point that the appellant needs to establish circumstances that require her release on bail. Reading the judgment of the court *a quo* in its entirety I am inclined to think that was nothing more than inelegant and inaccurate use of language on the part of the learned magistrate. I do not think that it amounts to more than that.

25. However, the submission that the learned magistrate found that the appellants circumstances would be the same if she were convicted, as set out in paragraph 22.2 above, is problematic. It indicates an attitude that shows a lack of appreciation of what the presumption of innocence means.
26. In regard to the submission made in paragraph 22.3 above that the learned magistrate questioned the purpose of bail if a person who committed an offence cannot be kept in custody. Consulting the passage in the record referred to in support of this contention, I believe a single sentence has been taken out of context to make this point. A fair reflection of what the learned trial magistrate was trying to say will be attained from reading the four preceding paragraphs as well as the two following paragraphs. If this is done, it does not support the contention made against the learned magistrate.
27. The submission that the learned magistrate was not entitled to criticise the fact that the appellant chose not to answer the State case as the law allowed her to do so. Here Mr Cloete submitted, that if the relevant passage of the record is read in its correct context, the learned magistrate did nothing more than give effect to the law which maintains that the appellant is perfectly within her rights not to answer the State case, but in making that choice the appellant must accept that consequences might flow from not meeting the case put

forward by the State. The only consequence that can flow from exercising her rights in this context is that the prima facie case put up by the State stands unchallenged. In that context, I agree with Mr Cloete.

28. In regard to the submission in paragraph 22.5, this is true as far as it goes but due regard has to be had to the requirements of s60(11)(a) of the Act. The appellant has to establish on the basis set out above that exceptional circumstances exist, which the interests of justice permit the release of the appellant on bail. It goes without saying that the considerations set out in sub-paragraphs 60(4) to 60(9) form a part of this evaluation.
29. On the basis set out in Porthen's case I am entitled to consider the evidence and determine if I am entitled to exercise my own discretion.
30. The appellant led evidence on three main areas to try and establish exceptional circumstances that would show that the interests of justice would permit her to be released on bail. These three areas were: Firstly, her state of health; Secondly, the businesses operated by her erstwhile husband and herself; and thirdly, the welfare of her children.
31. In her evidence in chief the appellant was at pains to make out a case that her medical conditions were life threatening. This approach did not survive cross-examination. The appellant was forced to concede

that her medical conditions were stable, that she was receiving her medication as well as medical treatment and had access to her family doctor if required and if the appropriate arrangements could be made. Nonetheless, it is also clear that the appellant was not in the pink of health. The evidence shows that at this point in time her medical conditions are not life threatening.

32. In and of themselves for the reasons set out herein, the medical conditions of the appellant do not constitute the required exceptional circumstances. That is however not the end of the matter the appellant's health issues will be weighed with the other factors to determine whether cumulatively with the other relevant issues she has established the required exceptional circumstances.
33. The issue of her and the deceased's businesses is also not as pressing as appellant made out in her evidence in chief. In cross-examination, appellant had to concede that her business, being SSS Suppliers, was closed down by the appellant several months before her arrest. Her version of businessmen waiting in the wings to invest was too vague to be given any credibility. The farm owned by the deceased is let and no management is required. In any event the farm falls within the estate of the deceased and without an executor the appellant would not be able to make decisions in respect of this property.

34. The other business which involves the Pofadder Hotel and the self-catering chalets was on the evidence conducted as one business. The evidence establishes that these properties also belonged to the deceased. Consequently, they also fall into the estate of the deceased. The appellant's evidence established that she was employed as a manager in the accommodation business. The appellant in her evidence concedes that there are staff members who can on a day-to-day level keep the hotel going. However, she maintains that she is the only person that has signing powers on the banking accounts.
35. In respect of the farm and the accommodation business it is probably more urgent for an executor to be appointed and take the reins of the businesses and appoint a manager where required than for the appellant to take up management of such businesses. It is also not entirely clear how these businesses have managed whilst the appellant has been detained if she is the only person who can operate the relevant bank accounts. Again, in and of themselves the business interests do not constitute the required exceptional circumstances. It remains to be seen whether taken together with the other remaining issues, the required exceptional circumstances are established.
36. The remaining issue is the well being of the appellant's 3 children. Here the appellant in cross-examination conceded that financially the needs of the children were taken care of. She also conceded that her

own mother, together with her sister and a person described as a day mother took care of the physical needs of the children. What remains is the emotional needs of the children. The evidence in this regard was that of the appellant that she had a close relationship with her 3 children who were aged between 10 and 12 years old. That the children needed her emotionally.

37. Ms Erasmus submitted on the basis of s28(2) of the Constitution¹³ that the needs of the children are of paramount importance in every matter concerning the child. She further submitted that it was common cause or at least that it was not placed in issue that she and the children had a close bond and they depended upon each other for emotional support.
38. Mr Cloete took exception to the contention that it was common cause that there was a close emotional bond with the children and that they needed her emotional support. He submitted that it was trite that every child would need his or her mother. He submitted that the only way he could challenge appellant's assertions would be to put the children on the witness stand and stated that this would traumatise the children and as a responsible prosecutor he would not do it.
39. More important is Mr Cloete's assertion that exceptional circumstances requires that something more than appellant's mere

¹³ Act 108 of 1996.

say so is required to establish exceptional circumstances in regard to the emotional well-being of the children in the context of a bail application subject to the provisions of s60(11)(a) of the Act. Further that to qualify as exceptional circumstances the appellant would have to establish a particular need for emotional support in one or more of the children that went beyond the normal requirement for emotional support. That the onus was on appellant to establish this.

40. He submitted that independent evidence would have been available as on appellant's own evidence, she and the children underwent trauma counselling. He submitted, also on the appellant's own evidence that it appeared that the children did better under trauma counselling than the appellant herself. He submitted that if appellant wanted to rely on this ground the evidence of the trauma counsellor ought to have been placed before the court.
41. Mr Cloete properly concedes that the circumstances for the children are not ideal. However, he maintains, and the evidence supports him in this, that insofar as material and financial needs and physical care of the children are concerned, they are better off than most children whose parents face criminal charges and detention awaiting trial.
42. To the extent that Mr Cloete contends that it is trite and not out of the ordinary for a child to require his or her mother for emotional support in difficult circumstances, I cannot but agree with him. In Mr

Cloete's assertion that in respect of the emotional well being of the children in the circumstances of a bail application subject to the provisions of s60(11)(a) of the Act something more is required than just the appellant's say so. I am also constrained to agree with Mr Cloete. Clearly the onus would be on the appellant to establish this special need.

43. Mr Cloete contends that the circumstances of the children of the appellant are not exceptional but ordinary. In and of themselves the position of the children in the present case do not amount to exceptional circumstances, but I need to look at the overall cumulative effect of all of the circumstances.
44. Although Mr Cloete has submitted and not without cause that the appellant has the propensity to threaten violence, I do not believe it has been established that there is a likelihood that she may harm anyone or endanger the safety of the public in general. Nor do I believe that there is a likelihood that she will commit a schedule 1 offence.
45. It is clear from the evidence that the appellant has historical and family ties to the area. Also, the evidence shows that her passport has expired. I do not believe the appellant is a likely flight risk.
46. The opportunity to influence or intimidate witnesses has been minimised as the investigation has been completed in the sense that

witness statements have already been taken. However, the evidence shows that the appellant contacted a Ms Fouche twice. Although some explanation has been given, I'm not entirely satisfied with the explanation in relation to the second incident (the Red Sands incident). The evidence shows that appellant disregarded the warning of the Investigating Officer and the warnings of her own legal representative. Also, the appellant also sought to mislead the police in their initial investigations by trying to incriminate her brother-in-law and certain employees of the deceased in circumstances where such allegations proved to be baseless. This evidence does show that if given the opportunity the appellant might conceal or destroy evidence, but on the available evidence, I cannot find that there is a likelihood that she would do so.

47. I cannot find that there is a likelihood that the appellant, if she was released on bail, would undermine the criminal justice system.
48. There is no evidence to show that if the appellant was released on bail, it would disturb the public order or undermine public peace and security.
49. Although at this stage of the proceedings it is not the function of this court to assess the evidence in relation to innocence or guilt of the appellant, on the evidence placed on the record by the State there is clearly a strong prima facie case for the appellant to answer. Appellant

is entitled to exercise her right to silence. The consequence of not dealing with the merits of the State case is that the strong prima facie case set up by the State goes unchallenged. If the appellant had in dealing with the merits of the State case established that the case was weak or open to challenge it would have strengthened appellants case for bail significantly. At this stage of proceedings, it would not be legitimate to take this issue any further than that.

50. The right to freedom set out in s12 of the Constitution is noted as is the right as is the right to bail under s35(1)(f) of the Constitution. I will endeavour to give effect to those rights in the context of s60(11)(a) of the Act. Nonetheless I have to remind myself that the starting point is that the legislature, due to the prevalence of certain crimes, enacted s60(11)(a) of the Act. This section places a burden of proof on the appellant to establish evidence that would satisfy this court that exceptional circumstances exist that would permit her to be released on bail.

51. My role, as I understand it, is to consider all of the evidence and to make a 'value judgment' on all of that evidence to determine whether the appellant has discharged the evidential burden placed on her to establish exceptional circumstances on the particular facts of the relevant case which, in the interests of justice would permit her release on bail.

52. On all of the evidence placed on the record in this bail application the value judgment that I make is that the appellant has not established the required exceptional circumstances that are sufficiently compelling to take her case for bail beyond the ordinary in order to show that the interests of justice would permit her release on bail.

In the circumstances:

- 1) The appeal is dismissed.



Lawrence Lever

Judge

Northern Cape Provincial Division

Counsel for the appellant: Ms Erasmus oio Duncan & Rothman

Counsel for respondent: Mr Cloete oio the DPP

Date of Hearing: 16 July 2021

Date of Judgment: 21 July 2021