

Reportable	YES / NO ✓
Circulate to Judges	YES / NO ✓
Circulate to Magistrates	YES / NO ✓



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

Case no: CA & R 7/2024

In the matter between:

**BRADLEY VAN ZYL
MELVIN DE BRUIN
JACOBUS VAN WYK**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

And

THE STATE

Neutral citation: *Van Zyl and Others v The State* (Case no CA & R 7/2024) (03 May 2024)

Date of hearing: 10 April 2024

Date of judgment: 03 May 2024

JUDGMENT: BAIL APPEAL

PHATSHOANE AJP

- [1] The first to third appellants, Messrs Bradley Van Zyl, Melvin De Bruin and Jacobus Van Wyk, all in their thirties, are alleged to have stolen 23 boxes of Solo Supreme deodorants worth approximately R100 000 out of a stationary Scania Truck near the N12 National Road, Victoria-West, on 23 November 2023. W/O Gerber and

Sgt Lottering arrested them on the same date without warrants and have been in custody since their arrest. They applied to be admitted to bail on 01 December 2023 pending their trial which Magistrate Coetzee, sitting at the District Court of Victoria West, Northern Cape, refused on 05 December 2023. It is against that refusal that they are before this Court on appeal.

- [2] It is common cause that the offence the appellants allegedly committed falls within the purview of Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA). It is set out as follows:

"An offence referred to in Schedule 1 [which includes theft, whether under the common law or a statutory provision] -

(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or

(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1."

- [3] The first appellant, Mr Van Zyl, has no previous conviction but has a pending case of theft or possession of a stolen vehicle and was on bail on 23 November 2023, when the present offence which resulted in this bail proceedings, was allegedly committed. The Second appellant, Mr De Bruin, has eight previous convictions for offences which involve an element of dishonesty, including housebreaking and several other offences such as theft out of a motor vehicle and shoplifting. His last previous conviction for theft was in 2018 where he was sentenced to 12 months' imprisonment wholly suspended on certain conditions. He states that since then he walked a clear path. The third appellant, Mr Van Wyk, has no previous convictions. However, like the first appellant, he had a pending case for theft of cigarettes valued at approximately R100 000 and was on bail at the time of the alleged commission of the present offence of which one of the conditions attached was that he should refrain from committing further criminal offences.

- [4] Section 60(1)(a) of the Criminal Procedure Act 51 of 1977 provides that an accused who is in custody in respect of an offence shall, 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 permit.¹ Section 60(11)(b) imposes upon an accused the onus to adduce evidence which satisfies the court that the interests of justice permit his or her release. It provides that where an accused is charged with an offence referred to in Schedule 5, as here, 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 the interests of justice permit his or her release.
- [5] In terms of Section 60(4) the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:
- “(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
 - (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
 - (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
 - (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

¹ Section 50 not only prescribes the manner in which all suspects must be dealt with after their arrest, but also rules that an ordinary suspect may not be detained indefinitely without the knowledge of and intervention by a lower court. See *Du toit- Commentary on the Criminal Procedure Act: RS 69, 2022 ch5-p43*.

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

- [6] In considering whether the ground set out in s 60(4)(d) above has been established the court may, where applicable, take into account, inter alia, (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings; (b) whether the accused is in custody on another charge or whether the accused is on parole; (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail condition.²
- [7] In resisting bail the State called Capt Valerie Booysen, the investigating Officer. The complainant informed the police that he had parked his work’s truck for a comfort break some 40 km outside Victoria West on 23 November 2023. He was about to drive off when he noticed a person running from the truck’s trailer. He alighted and saw a second individual jumping out of the trailer and running into the bush. He tried to pursue the two men but they evaded him. Upon inspection he noticed that the trailer’s tarp was torn and that some deodorant boxes were missing. He walked some distance into the veld and saw where the boxes had been stashed. He summoned the police and pointed to them the direction the men took. The police, in an unmarked vehicle with emergency lights on, gave chase.
- [8] Significantly, the fleeing two men were not carrying any backpacks. A silver VW Vehicle stopped and the duo jumped into it. The police pursued the VW Vehicle on the N1 road for some 30 km. Eventually the VW stopped near Three Sisters where the complainant pointed out the first and second appellants to the police. The third appellant’s vehicle was searched. A backpack containing the second appellant’s clothing was found inside. The appellants were apprehended. The I/O further testified that upon their arrest the appellants informed the police that the first and second appellant were unemployed while the third appellant was employed. She

² See s 60 (8) (a)-(c) of the CPA.

intimated that what they had set out in their affidavits, concerning their employment status, differed from what they had told the police.

- [9] The appellants did not adduce *viva voce* evidence but handed in affidavits in support of their respective applications for bail including a petition signed by 41 members of the community of Beaufort-West seeking their release on bail. Their affidavits contained almost identical averments to the effect that they never stole from anyone. They intend to plead not guilty and deny the allegations levelled against them. Their defence is that the first and second appellants left Beaufort-West for Victoria West on 23 November 2023. They alighted their lift and took a walk. They past a truck that was about to leave its parking bay and heard a loud noise coming from it. The truck driver scolded and accused them of stealing. The truck driver summoned the police in the presence of the appellants who stood by and waited as they never stole from him. Approximately 40-50 minutes later a bakkie came out of nowhere and fired shots at the two appellants. They ran into the bush and returned to the road where they saw the third appellant's vehicle driving towards Beaufort-West. He gave them a lift as their lives were in danger. The police officers stopped the appellants' vehicle and searched it. They were arrested. The truck driver was present and recorded a video footage of the arrest and the search.
- [10] Further contained in the appellants' affidavits are averments that they will not evade their trial; they do not know the identities of the State's witnesses and thus have no intention to interfere with them; they also bear no knowledge of evidential material relevant to the allegations made against them and undertake not to interfere with the investigation; they have stable relationships and contribute towards the maintenance of their dependents; they have fixed addresses and have no outstanding warrants of arrests and should they be kept in custody their livelihoods and those of their families would be prejudiced. In respect of the first and second appellants, who are alleged to be doing odd jobs, it was submitted, their continued incarceration entails "no work and no pay" whereas the third

appellant, who has been a firefighter for a period of 14 years, would face possible dismissal. This would destroy their family support base; ruin them financially and would have no means to appoint private legal representatives to defend them. They claim that they would meet any stringent conditions attached to their bail.

- [11] In determining whether to admit the appellants to bail the Magistrate was of the view that the grounds listed in s 60(4)(a) and (d) of the CPA found application. Firstly, because there was a likelihood that if the appellants were released on bail, they would endanger the safety of the public, any person against whom the offence was allegedly committed, or any other particular person or will commit a Schedule 1 offence; and secondly, they would undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.
- [12] The Magistrate remarked that the State had a reasonably strong case against the appellants. He noted that the first and third appellants had pending criminal trials against them whereas the third appellant had recently been released on bail and has therefore breached its condition. As for the second appellant, the Magistrate reasoned, he had previous brushes with the law and thus not a stranger to the criminal justice system. The Magistrate held that, regard being had to the manner in which the offence was planned and executed; the presence of previous convictions and the pending criminal cases against the appellants, they were likely to commit a Schedule 1 offence should they be released on bail. He further took the view that they undermined and would undermine the bail system. Accordingly, the court found, it was not in the interest of justice to release the appellants and consequently dismissed their bail application.
- [13] Mr Paries, for the appellants, argued that they have family ties in Beaufort-West, fixed addresses, and are gainfully employed breadwinners in stable relationships with no discernible risk of not standing their trial or the possibility of absconding. In addition, it was argued that the first and third appellants did not breach their bail conditions and that all the appellants would plead not guilty to the charge of theft at the trial in due course. Any sanction for the offence, in the event of a conviction,

may be equivalent to the period the appellants would have been detained awaiting their trial. These were reasons why bail ought to be granted, so ran the argument.

- [14] On the merits, it was contended for the appellants, that the evidence against them at trial will be that of the police and the truck driver, a single witness who had been exhausted at the time of the alleged commission of the offence. It was further argued that the prospects of the State securing convictions against the appellants were weak. Without setting out any basis for that submission, it was contended that I/O Booysen, who testified in this case, may be biased.
- [15] It was further argued that the Magistrate misdirected himself in not considering that the third appellant was not at the scene of the crime or identified as a perpetrator. That the Magistrate took no heed of the first and second appellants' evidence that the truck driver was very disturbed and aggrieved; that the court had no regard to factors generally used to identify the persons the truck driver approached; that the Magistrate erred in not considering that no stolen goods were found in possession of the appellants and there had been no fingerprints evidence presented to the court. Insofar as the Magistrate found that the likelihood was extant that the appellants may commit a Schedule 1 offence, it was argued, he erred.
- [16] According to the appellants the Magistrate failed to produce a value judgment on the strengths and weaknesses of the State's case. Any threat or harm to the witnesses or interference with the investigation or any risk that the appellant may be rearrested, it was argued, could be remedied by attaching suitably strict bail conditions which would adequately safeguard the interests of all the parties.
- [17] The crux of the State's argument in opposing bail and resisting this appeal is that it has a very strong prima facie case of theft against the appellants and that it had been able to establish the existence of a likelihood that the appellants, if they were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system as contemplated in s 60(4) (d). Insofar as the first and third appellant had pending criminal cases involving theft and the second appellant, eight previous convictions

for offences involving an element of dishonesty, it was argued, the likelihood exists that they will commit a Schedule 1 offence.

- [18] It is trite that an accused has an entrenched right to be released from detention if the interest of justice so permits. In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*³ the Court pronounced:

"[49]. . . Subsections (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had 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 as well to remember that s 35(1)(f) itself places 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 s 60(2)(c), (3) and (10) to play a proactive role and is helped by ss (4) to (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail."

At 79d-g para 53 it was said:

"[53]. . . But s 35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial-related factors are to be taken into account. The broad policy considerations contemplated by the 'interests of justice' test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, ie a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis

³ 1999 (2) SACR 51 (CC) at 78f-h para 49.

for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds.”

- [19] It is now settled that the powers of this Court are largely circumscribed where the matter comes before it on appeal and not as a substantive application for bail. The Court must be swayed that the Magistrate exercised the discretion which he or she has wrongly. Even though the Court may have a different view, it should not substitute its own view for that of the Magistrate as that would be an unfair interference with the Magistrate’s exercise of his discretion.⁴
- [20] Every accused person has a right to a fair trial, which includes, *inter alia*, the right to be presumed innocent, to remain silent, and not to testify during the proceedings.⁵ It was not disputed that the appellants would not temper with the evidence or that they were not flight risks. On the contrary, the evidence suggests that they pose no danger to the community of Beaufort-West. The opposition by the State is primarily based on the appellants’ past conduct and that it has a strong *prima facie* case against them.
- [21] The Magistrate may not have pertinently addressed the merits and demerits of the State’s case. However, it does not follow that he did not apply his mind to this aspect. It is to be remembered that a Court hearing a bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie with regard to bail.⁶ In any event, it is often impossible, in a judgment, to refer to all the considerations that arise. One of the principles applicable to appeals on questions of fact as laid down in *R v Dhlumayo*⁷ is this:
- “An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”

⁴ *S v Barber* 1979 (4) SA 218 (D) at 220 E-G; See also the judgment of this Court in *S v Nteeo* 2004 (1) SACR 79 (NC) at 82g-83c, para 8.

⁵ Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996.

⁶ *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* above n 3,) at 63e-64a, para 11.

⁷ 1948 (2) SA 677 (A) at 705–706.

[22] The views expressed by Heher JA in *S v Mathebula*⁸ are apposite:

“But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA); (2002 (2) SA 680; [2002] 2 All SA 577) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (2) SACR 761 (CC); (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus, it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect.”

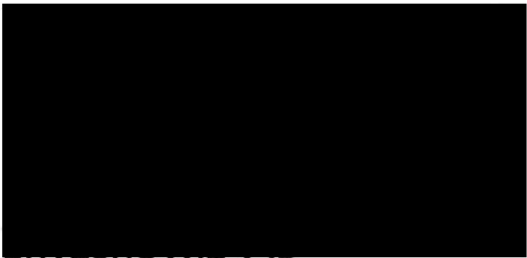
[23] In my view, the State has a fairly compelling prima facie case against the appellants. To discharge the onus the first and second appellant did not adduce any exculpatory evidence with regard to their presence in the vicinity of a truck with which they had no connection. It is fairly apparent that the third appellant acted in cahoots with the first and second appellant. I say this because it was not disputed that the second appellant's backpack was found in the third appellant's vehicle during the police search. The second appellant must have put his bag in the vehicle prior to the alleged nefarious activities. In short, the third appellant lurked in the background and drove the getaway vehicle. No cogent criticism can be sustained insofar as the Magistrate concluded that the offence appears to have been planned.

⁸ 2010 (1) SACR 55 (SCA) para 12.

- [24] It is so that an accused should not be deprived of bail simply on the basis of his previous misconduct. Much will depend on the nature of the charges involved. The appellants did not put up evidence, despite the onus that rested on them, that they are unlikely to run into conflict with the law in future. It is an important consideration that the first and third appellant had pending theft cases. The third appellant was less than frank when he claimed not to have breached his bail conditions. To the extent that one of the bail conditions was that he should refrain from committing further criminal offences, he breached it.
- [25] The second appellant has relevant previous convictions. It matters not that the last such conviction was more than five years ago as his counsel sought to argue. He clearly has the propensity to commit further similar offences. It also does not enure to the benefit of the appellants that 41 members of the community of Beaufort-West support their release on bail. The alleged theft from a stationary truck suggests that the appellants are a menace to the society.
- [26] Two of the grounds as listed in s 60(4)(a) and(d) have been established. Having weighed the appellants' right to personal freedom and carefully considered their personal circumstances against the interest of the society, the Magistrate's conclusion that it was not in the interest of justice that the appellants be released on bail is above reproach. The denial of bail on the ground that the appellants will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system or commit a Schedule 1 offence is manifestly in the interest of justice. The upshot of this is that the appeal must fail. In the result, the following order is made:

ORDER:

The appeal is dismissed.



PHATSHOANE AJP

NORTHERN CAPE DIVISION

<i>Appearance for the appellants: Adv A Paries Instructed by Borchards Attorneys, Cape Town C/o Matthews & Partners, Kimberley.</i>
<i>Appearance for the respondent: Adv L Pillay Instructed by Director of Public Prosecutions, Kimberley.</i>