



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**APPEAL CASE NO: A 248/2023
LOWER COURT CASE NO: G 163/2023**

In the matter between:

BONGANI KAMENI

Appellant (Accused 5)

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 07 AUGUST 2024

ANDREWS, AJ

[1] This is an appeal in terms of Section 65(4) of the Criminal Procedure Act¹ ("CPA"), against the decision of the Presiding Magistrate, Ms Mohamed, on 17 July 2023 in Bellville Magistrate's Court to refuse the Appellant's release on bail.

¹ Act 51 of 1977.

Factual Background

[2] The Appellant was arrested on 15 February 2023. He is one of five (5) other accuseds who face multiple charges which include Section 9(2)(a) of the Prevention of Organised Crime Act ("POCA")², kidnapping, Trafficking in Persons, Robbery with Aggravating Circumstances, Attempted Murder and Contraventions of the Firearms Control Act³.

[3] According to the Investigating Officer, Warrant Officer, Alroe Luiters ("W/O Luiters"), information was received on 22 January 2023, by the Multidisciplinary Task Team that led them to the identification of a stronghold where two hostages were being detained and tortured. The Special Task Force penetrated the identified premises where the two hostages, being Bangladeshi Nationals, were found tied up with cable ties and badly injured. Accuseds 1, 2 and 3 were arrested on the premises. The hostages explained that they were taken at gunpoint close to their place of business and forced into a bakkie. Thereafter, they were forcefully transferred into another vehicle and taken to an unknown premise, where they were assaulted. They were forced to provide the passwords to open their phones so that their family members could be called for a ransom of R2 million.

[4] Information was received identifying who the masterminds were behind the kidnapping, namely accuseds 4 and 6 respectively. Based on the evidence obtained from the witness statement as well as information obtained through investigation, a J50 Warrant of Arrest was issued for accused 4. The pocket book of the Appellant,

² Act 121 of 1998.

³ Act 60 of 2000.

who was a police officer, working at Nyanga FCS, was found in the bedroom on the bedside table of Accused 4's house. The girlfriend of Accused 4 informed that she was travelling in a blue Hyundai Tucson, which was driven by Accused 4. The Appellant was sitting in the backseat of the vehicle. She explained that two men were forced into the back seat, thereby implicating the Appellant in the kidnapping on 21 January 2023. A number of vehicles were identified as having been used in the commission of the offence(s), which also included *inter alia*, a white Toyota Avanza, an unmarked SAPS vehicle belonging to the FCS Unit Nyanga, where the Appellant was stationed.

[5] The vehicles were fitted with trackers and from the tracking reports it was established that the vehicles, more specifically the Toyota Avanza was in the vicinity of and/or close proximity of the crime scene on 20 and 21 January 2023 respectively. The detailed billing of cellphone records also established that the Appellant was in the area on 20 and 21 January 2023 respectively. A J50 warrant was obtained for the Appellant whereafter he was arrested. The Appellant's office was searched and various exhibits were found in the office as well as in the roof of his office which were seized. His place of residence was also searched where exhibits which included cellphones and buccal samples were seized.

[6] The Appellant (Accused 5 in the bail application), together with Accuseds 1 to 4 formally applied for bail in the Bellville Magistrates Court. Accused 6 abandoned his bail application. On 17 July 2023, bail was denied for Accuseds 1, 2, 3, 4 and 5.

[7] The Appellant has now approached this court to appeal the decision of the Magistrate and seeks the following relief:

- (a) That the Appellant be granted bail in terms of Section 65 of the Criminal Procedure Act;
- (b) That an amount of R5000, or any amount as determined by the court be fixed for bail;
- (c) That the Appellant be ordered to comply with stringent bail conditions such as:
 - (a) to report to the South African Police Services stationed at Harare SAPS when requested to do so with his legal representative;
 - (b) be ordered not to interfere with witnesses, all police officers from the unit involved in the investigation of the case;
 - (c) be ordered not to directly or indirectly contact or interfere with any of the state witnesses, who may become known to him at any stage;
 - (d) comply with any other bail conditions set by the court.

The grounds of Appeal

[8] The Appellant avers that the Magistrate erred in finding:

- (a) That there are no exceptional circumstances and that the interest of justice does not permit the Appellant's release on bail;
- (b) That the Appellant did not comply with bail conditions or is recalcitrant;
- (c) That the Appellant is a flight risk;
- (d) That the release of the Appellant will undermine the proper functioning of the criminal justice system, whereas the Appellant's constitutional rights to liberty were infringed;

- (e) In placing undue emphasis on the seriousness of the offences and found that the Appellant's personal circumstances do not warrant the granting of bail in the interest of justice.

[9] The Appellant further avers that the Magistrate misdirected and erred in denying the Appellant bail because:

- (a) The Appellant is not a danger to the community;
- (b) The Appellant is not a regular offender;
- (c) The Appellant has a fixed address and strict bail conditions will cure the risk of flight;
- (d) The Appellant has been incarcerated since February 2023;
- (e) The Magistrate erred in not giving due weight to the personal circumstances of the Appellant which in the interest of justice permit his release as the Appellant:
 - (i) has no previous convictions;
 - (ii) has a fixed address;
 - (iii) is employed as a police officer and faces occupational detriment;
 - (iv) was arrested on duty;
 - (v) co-operated with the police;
 - (vi) handed in his official firearm;
 - (vii) has three dependents and supports his family as the main breadwinner and
 - (viii) resides in a rental home with personal belongings and owns a vehicle which are unsecured while being detained in custody.

Legal Framework

[10] Section 65(4) of the Act provides for the test of a Superior Court to interfere with a decision of the Lower Court to refuse bail.

'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court/judge is satisfied that the decision is wrong, in which event the court or judge shall give the decision which in its opinion the lower court should have given'

[11] It is trite that the functions and powers of the court or judge hearing the appeal under Section 65 are similar to those in an appeal against conviction and sentence. In **S v Barber**⁴, Hefer J 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. 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...'*⁵

[12] It is common cause that the Appellant has been arraigned on charges listed under Schedule 6. A Schedule 6 bail application, given the nature and seriousness of the offences for which it has been introduced, placed the onus on the Appellant by virtue of section 60(11)(a) of the CPA to prove on a balance of probabilities, that *exceptional circumstances* warranted his release on bail. Section 60(11) stipulates that:

⁴ 1979 (4) SA 218 (D) at 220E – H.

⁵ See also *Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para 7.

'Notwithstanding any provision of this Act, where an accused is charged with an 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 interests of justice permit his or her release'*

[13] The effect of Section 60(11)(a) was exhaustively discussed and elucidated in the Constitutional Court's seminal judgment in ***S v Dlamini; S v Dladla; S v Joubert; S v Schietekat***⁶. It imposes an onus on the applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail.

Interest of justice

[14] Interest of justice considerations are premised on Section 35(1)(f) of the Constitution⁷ which states that *'[e]veryone who is arrested for allegedly committing an offence has the right...to be released from detention if the interests of justice permit, subject to reasonable conditions.'* The court must therefore be satisfied that the release of the accused is in the interests of justice. Section 60(4) of the CPA, sets out a list of circumstances in which it would be in the interest of justice to grant bail.⁸ It is

⁶ [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC).

⁷ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁸ '(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 or any 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*

trite that these factors serve as useful guidance in assisting the court in arriving at a just decision.

[15] It was contended that the Magistrate did not make a value judgment regarding the inherent strengths and weaknesses of the case. It was also submitted that the seriousness of the offence was over-emphasised by the Investigating Officer and the Court.

[16] The strength of the State's case is rooted in the evidence of a witness that placed the Appellant in the vehicle when the hostages were transferred from the original vehicle in which they were taken. This vehicle transported the hostages to the location where they were detained and tortured with the ultimate goal of extorting monies from them and/or family members. The Appellant is further linked by means of cellphone records and vehicle tracking devices that puts the State vehicle that was in his possession, in the vicinity of the crime scene on the day in question. The role of the Appellant, as a police officer, extended to him being able to access information. The investigation uncovered information that were downloaded from the SAPS criminal administrative system ("CAS system") on the Appellant's personal cellphone, to bolster the allegations against him.

[17] The nature and gravity of the offence is a crucial consideration in that there is a prospect of long-term imprisonment on conviction. The court *a quo* had

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- (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;*
 - (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'*

regard to the fact that the Appellant has been charged as part of an organised criminal gang under the POCA legislation. The State is invoking the provisions of Section 9(2)(a) of POCA which stipulates:

‘9. *Gang related offences.*—

(1) ...

(2) *Any person who—*

(a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity; ...
shall be guilty of an offence.’

[18] The Appellant has been identified as being part of the “gang”. His involvement in the offences as articulated by the W/O Luiters, links him to the offences as a person as described in Section 9(2)(a) of POCA. Although the Appellant proffers a version or explanation, it must be emphasized that the burden of proof at a bail hearing is not proof beyond reasonable doubt, but whether a *prima facie* case has been established by the State. It is therefore incumbent for the State to put forth valid reasons why bail should not be granted to the Appellant. Inasmuch as “*the State cannot simply hand up the charge sheet*” to prove its case as set out in *S v Maja*⁹, it is implied that the Defence cannot simply criticize the State’s case without providing some form of rebutting proof for their allegations in order to prove their case on a balance of probabilities.

[19] In this regard, the State presented the *viva voce* testimony of W/O Luiters; his sworn affidavit and corroboratory evidentiary material such as the crime

⁹ 1998 (2) SACR 673, at 678e-679c.

scene photos; photo album depicting the hostages injuries; tracker reports of the identified vehicles involved in the crime; AVL of SAPS Toyota Avanza; information on the downloads from the cellphone of the Appellant which were suggestive that he was possibly involved in other kidnappings as well and served as proof that the Appellant was regularly monitoring the CAS system to which he had access. It was also alleged that the Appellant made a self-incriminating statement.

[20] It is however noteworthy that the Appellant alleged that Accused 4 is a friend and that he checked the details of the case after his friend was arrested, which was later brought into question as Accused 4 was only arrested on 1 February 2023 but according to the downloads received from the Appellant's cellphone it was discovered that he had checked the CAS system four days prior to this particular date on 26 January 2023. The state averred that if Appellant had no knowledge or interest in the kidnapping case he would not have checked the CAS system and especially not before his friend accused 4 was arrested.

[21] The Appellant however proffers an explanation why he was in the vicinity of Delft, presumably on the periphery. It was contended that in view of the Appellant's likely defence, the prospect of conviction is not high. In addition, it was placed on record that identity will be placed in dispute because the complainants cannot identify the Appellant. The matter of **S v Branco**¹⁰ reinforces the position that a bail application is not a trial:

'The prosecution is not required to close every loophole at this stage of the proceedings. However, a factor favouring bail is whether the Appellant has established a defence which has a reasonable prospect of success at the trial.'

¹⁰ 2002 (1) SACR 531 (W).

[22] The Appellant acknowledged that the nature of the charge is serious. It was however contended that Appellant is facing mere allegations and is presumed innocent. It was submitted that there is no direct evidence linking the Appellant to all the charges. In this regard, it argued that there is no evidence placing the Appellant physically at the scene of the kidnapping and neither is there direct evidence that he is linked to the robbery and unlawful possession of the firearm charges. It was furthermore contended that there are no fingerprints or DNA linking the Appellant to the matter.

[23] POCA recognised that there is rapid growth of organised crime, money laundering and criminal gang activities. It further recognises that organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights. Of pivotal importance, POCA recognises that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not form part of the actual activities themselves. It is for this reason that legislature found it prudent to criminalise the management of and related conduct in connection with enterprises which are involved in a pattern. Therefore, the purpose and effect of bail insofar as it relates to the presumption of innocence requires sharp focus in dealing with matters of this nature. In my view, matters invoking the provisions of POCA requires a wider lens. The definition of “gang” on the facts of this matter clearly comprise of individual members who all operate in synergy to achieve an overall purpose in the execution of the crime. Therefore, the presumption of innocence has to be considered within the context of what was stated by the Constitutional Court in ***S v Dlamini and Others; Joubert en Schietekat*** (*supra*), that:

*'...There is widespread misunderstanding regarding the purpose and effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending under s 35(1)(f). The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.'*¹¹

[24] The unanimous court decided that the right to be presumed innocent is not a pre-trial right but a trial right. The court in **Barense and Another v S**¹² referred with approval to the matter of **Conradie v S**¹³ where the following was stated:

"The appellant's counsel also argued that the magistrate had failed to have sufficient regard in her evaluation of the evidence to presumption of innocence. In this regard counsel emphasised that the remark by Steyn J in S v Mbaleki and Another 2013 (1) SACR 165 (KZD) in para 14 that the Constitutional Court had decided in Dlamini supra, that 'the right to be presumed innocent is not a pre-trial right but a trial right' found no support in the text of the Dlamini judgment. It appears to be correct that the Constitutional Court did not express itself in those terms. It is clear, however, that the Court considered that the provision of the Constitution most pertinent to its treatment of bail applications affected by s 60(11) of the Criminal Procedure Act was 35(1)(f), which provides that 'Everyone who is arrested for allegedly committing an offence has the right - ... to be released from detention if the interests of justice permit subject to reasonable conditions'. That is a qualified liberty right, not a fair trial right. The presumption of innocence is indeed a peculiarly trial-related right as evidenced by its entrenchment as one of the fair trial rights listed in s 35(3) of the Constitution. I therefore agree with Steyn J's stated view that the presumption of innocence does not play an operative role in bail applications.

A court seized of a bail application fulfils a very different function from a trial court. Its role is not to determine the guilt or innocence of the accused person. The bail court's concern with the interests of justice, in the sense of weighing in the balance 'the liberty interest of the accused and the interests of society in denying the accused bail', will however in most cases entail that it will have to weigh, as best it can, the strengths or

¹¹ See also *S v Miselo* 2002 (1) SASV 649 (K) at para 23.

¹² See *Barense and Another v S* (A01/2023) [2023] ZAWCHC 125; [2023] 3 All SA 381 (WCC) (22 May 2023) at para 25.

¹³ [2020] ZAWCHC 177 (11 December 2020) at paras [19]-[20].

weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment."
[Emphasis added.]

[25] The court in **Barensse and Another v S**¹⁴ also referred with approval to the matter of **Mafe v S** where Lekhuleni J remarked as follows regarding the presumption of innocence:

"In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(a), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the other hand, must show that, notwithstanding the accused's presumption of innocence, it has a prima facie case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society."
[Emphasis added.]

[26] It is therefore manifest that the presumption of innocence does not automatically entitle an applicant for bail to be released. The court *a quo* considered the probabilities of the Appellants version. It was argued that there are no serious allegations of taxi violence and gangsterism. The court *a quo* however, had regard to the method of operation of being part of an organised crime gang who would make ransom calls to the family of the victims once the criminal case was reported and registered on the SAPS CAS system. In this regard, each person would have a specific role to play for a common purpose and benefit of a criminal gang. The court *a quo* in its judgment noted that from the information gathered from the investigation that this

¹⁴ At para 26.

gang may have been involved in similar kidnappings in the Western Cape as asserted by the State. It is therefore evident that the court *a quo* was mindful, in contemplating its decision, that the provisions of POCA were invoked which requires that the matter be viewed through a different lens and not in terms of an individual's participation working in silos.

[27] The presumption of innocence is therefore not a principal factor to be considered in light of it being a trial right. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the Appellant to adduce evidence and persuade the court that exceptional circumstances exist that in the interest of justice warrants his release on bail. It is incumbent upon a court to consider this right together with the strength of the State's evidence. I agree with the court in **Barense** that *"[I]f the right to be presumed innocent was overarching it would mean that every bail applicant had to be released on the basis that he or she was presumed innocent. That could not have been the intention of the legislature".*¹⁵

[28] It was contended that the Appellant has family ties in the Western Cape as well as dependents and therefore there is no discernable risk of him not standing trial. This, it was argued, could be achieved by imposing a condition that the Appellant be constrained and confined to the Western Cape. In augmentation of this submission it was submitted that the police did not need to apply for a warrant of arrest to secure the Appellant's attendance and co-operation. It was argued on behalf of the Appellant that he is not a flight risk.

¹⁵ At para 27.

[29] It is common cause that a J50 warrant for the Appellant was obtained pursuant to their investigations.¹⁶ It is undisputed that the Appellant was arrested at his place of employment and that he granted the arresting officers' permission to search his office and his house. It is also uncontroverted that the Appellant gave his full co-operation. These factors were placed before the court *a quo* at the bail hearing.

[30] Section 60(6) of the CPA sets out the considerations which are to be taken into account when considering whether an accused will abscond.¹⁷ The State argued that the embarrassment of being a police official seen in light of the charges the Appellant is facing together with the strength of the State's case may serve as an incentive to flee. It must also be borne in mind that the penalty provisions in terms of Section 10 of POCA attracts a period of imprisonment.¹⁸ The other charges on which the Appellant has been arraigned attract sentences in terms of the Minimum Sentence

¹⁶ W/O Luiters - Affidavit, para 5.17 – 5.20, pages 484 - 485 of the bundle.

'We all attended the briefing for a special operation to search for an outstanding suspect, namely Bongani ...Kameni of which I was in possession of a J50 Warrant of Arrest that was authorized by Bellville Court on 2023 – 02 – 07 ...After I received the J50 Warrant of Arrest from W/O Carelse I showed it to Constable Bongani Kameni and arrested him.... During the time that I was still explaining the charges on the J50 Warrant of Arrest with him... We then followed as the suspect, Bongani Kameni wanted to point out his office...'

¹⁷ '(6) In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors namely –

- (a) The emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) The assets held by the accused and where such assets are situated; the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (c) The extent, if any to which the accused can afford to forfeit the amount of bail which may be set;
- (d) The question whether the extradition of the accused could readily be effected should be or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (e) The nature and the gravity of the charge on which the accused is to be tried;
- (f) The strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (g) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (h) The binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or any other factor which in the opinion of the court should be taken into account.'

¹⁸ '...section 9 (1) or (2) (a) shall be liable to a fine, or to imprisonment for a period not exceeding six years;...'

Legislation¹⁹. As correctly pointed out by the Appellant, it remains the duty of the court to carefully weigh up all the facts and circumstances pertaining to the case.²⁰

[31] In ***S v Van Wyk***²¹ it was found that, not only is it the duty of the court to consider the relative strength of the State's case, but also that this fact, added to a relative long term of imprisonment awaiting on conviction, may lead to an accused released on bail pending his trial, to abscond.²² From the judgment of the court *a quo*, in *casu*, it is evident that this factor was considered at the bail hearing.

[32] It was contended that the Magistrate misdirected in finding that the Appellant who was arrested much later than his co-accused would interfere with the investigation or witnesses or conceal evidence. At the hearing, the State produced evidence detailing the Appellant's involvement in the activities of the "gang" as earlier outlined. To reiterate, the Appellant accessed the CAS system and took photographs on his personal cellphone of the hostages' details including their addresses, which was seized when he was arrested.

[33] The court *a quo* had regard to the fact that the Accuseds were familiar with the identity and location of crucial witnesses. The court *a quo* took cognisance of the allegation that the witnesses were tracked and targeted for a considerable period of time prior to the kidnapping. The court *a quo* had regard to the risk of the witnesses potentially being threatened, intimidated or harmed. The court *a quo* heeded to the

¹⁹ Section 51 of the Criminal Law Amendment Act 105 of 1997.

²⁰ See *S v C* 1995 (1) SACR 639 (C) at 640h.

²¹ 2005 (1) SACR 41 (SCA).

²² See also *S v Nicholas* 1977 (1) SA 257 (K) at 263; *S v Hudson* 1980 (4) SA 145 (D) at 146.

fear expressed by the hostages that they are terrified at the prospect of the accuseds being released.

[34] The state perceived that the Appellant, by informing the investigative team that his sister is a brigadier in the South African Police Services, as being a way of trying to intimidate the investigative team. This perception was created by the fact that the Appellant's family members are of higher rank and more influential. Furthermore, the Appellant, being a police officer had access to the CAS system.

[35] In addition, the Appellant was previously convicted for failure to comply with bail conditions at the time when he was a detective. This, it was argued, shows that there is a likelihood that he will breach bail conditions. He had previous arrests for domestic violence related matters. It was contended, that this is aggravating by virtue of the nature of his employment as a police officer who is expected to know the law and in an informed position of understanding the consequences of breaching bail conditions. In this regard it was argued that the Appellant is expected to be more law abiding. Furthermore, it was argued that nothing came from the allegations of intimidation.

[36] At the bail hearing, the court *a quo* had regard to the public outcry, fear and lack of confidence in the justice system and policing safety, which may result in the community taking law into own hands. This court is mindful of what was held in ***Solomon v The State***²³ where the court held:

²³ [2019] 2 All SA 833 (WCC).

'I believe that the State has made out a case for exceptional circumstances under s 60(4)(e) and that it is not within the interest of justice to grant bail. The fact that, despite the lack of previous convictions, the serious problem with gang-violence on the Cape Flats, to which the Applicant has been linked, outweighs the right of the Applicant in the present instance.'

[37] In considering whether the Appellant would undermine public peace and security, the concerns included that the Appellant is a police officer and has access to information on the CAS system in respect of the victims; that he has friends and family in the in the employ of SAPS who would be able access the information for him. It was contended that because the Appellant has access to firearms he is in clear danger to the public at large, if regard is to be had to the seriousness of the offence. The Appellant challenged the contention that there would be danger of interference in investigation, which could be allayed by the imposition of strict bail conditions. The Appellant contended that there are remedies available to the court to address concerns regarding the threat of witnesses disappearing if the Appellant were to be released on bail. These remedies could include daily reporting to the police station. Furthermore, it was contended that the state did not raise a concern about propensity to commit crime.

Exceptional Circumstances

[38] It was contended that the Magistrate misdirected that there are no exceptional circumstances. There is an abundance of case law dealing with the considerations taken by courts in determining what exceptional circumstances may

be. In **S v Mohammed** ²⁴ the Court held that "exceptional" circumstances had two shades or degrees; either meaning unusual or different, or markedly unusual or especially different. Comrie J placed the emphasis on the degree of deviation from the usual as it appears from a statement:

'So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the Applicant's release. And "sufficiently" will vary from case to case.'

[39] In **S v Mokgoje** ²⁵, the court was of the view that the concept referred to circumstances that were unique, unusual, and particular. In **S v Scott - Crossley** ²⁶ it was held that:

'Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11) (a).'

[40] In **S v Petersen** ²⁷ the Court determined that "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. In **Director of Public Prosecutions v Nkalweni** ²⁸ the word was given the meaning of "unique, unusual, rare and peculiar". In **S v Ntoni and others** ²⁹ the Court held that:

'Generally speaking what may constitute exceptional circumstances in any given case depends on the discretion of the presiding officer and the facts peculiar to a particular matter. In the context of the provision of s60 (11) (a), the exceptionality of the circumstances must be such as to persuade the court that it would be in the interests of justice to order the release of the accused person. It requires the court to exercise a value judgment in accordance with all the relevant facts and circumstances.'

²⁴ 1999 (2) SACR 507 (C), page 515.

²⁵ 1999 (1) SACR 233 (NC).

²⁶ 2007 (2) SACR 470 (SCA) at para 12.

²⁷ 2008 (2) SACR 355 (C) par 55.

²⁸ 2009(2) SACC 343 (Tk).

²⁹ (5646/2018P) [2018] ZAKZPHC 26 (22 June 2018) at par 32.

[41] The Appellant's exceptional circumstances have been listed in the grounds of appeal. Emphasis was placed on the following factors, namely:

- (a) the Appellant has been in custody since February 2023;
- (b) that prior to his incarceration, he was the breadwinner and caregiver.
- (c) that further delay or incarceration would negate the prospect of maintaining his family as his incarceration has had disastrous financial and social effects on his family at unnecessary expense to the state;
- (d) that the Appellant was involved in a relationship at the time of his incarceration;
- (e) Concerns were raised about the well-being of the Appellant's family, especially his children;
- (f) That he has been in custody awaiting trial for a considerable period of time and no trial date has been determined;
- (g) that he has a fixed address;
- (h) that as a police officer, he is entrusted to carry 280 dockets for investigation;
- (i) that he intends pleading not guilty;
- (j) that he refutes that he will contravene any of the grounds set out in Section 60(4) of the CPA;
- (k) that he is employable and may lose employment;
- (l) that the two pending matters were finalised;
- (m) that his incarceration will harm his ability to receive proper legal representation and will be in a better position to defend his case if he was out on bail;
- (n) that he has a close family member of high rank in the police has been mooted to possibly count in his favour which is underscored by the manner in which he co-operated with the police after his arrest.
- (o) that the community did not raise serious objections to his release and

(p) that the state did not raise the aspect that the Appellant is a flight risk or would not stand trial.

[42] These factors were substantially placed before the court *a quo* and the court in exercising its discretion, did not regard those factors as exceptional. Of course, should new facts arise, the Appellant is at liberty to approach the court and make an application for bail based on the new facts. It behoves this court ultimately to consider whether the court *a quo* came to a wrong decision on the facts that was before it at the time of the bail hearing. There is a myriad of case law on point where courts have granted bail and refused bail for different reasons, as several factors ultimately informs a court's decision in determining whether the interest of justice permits an accused's release on bail. Each application ought to be decided on its own merits, based on the objective facts placed before it.

[43] In ***S v Porthen & others***³⁰, Binns-Ward AJ (as he then was), considered it necessary to point out that a court hearing a bail application (i.e. the court *a quo*), exercises a wide as opposed to a narrow (or strict) discretion. Binns-Ward also observed that it remains necessary to:

*'be mindful that a bail appeal, goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 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" ...'*³¹

³⁰ 2004 (2) SACR 242 (C) at para 7.

³¹ At para 17, See also *Killian V S* [2021] ZAWCHC 100 (24 May), para 8.

[44] The contention that there was an over-emphasis of the seriousness of the offence, without regard to the Appellant's lesser degree of participation, must be viewed within the context of the provisions of POCA as earlier stated. The value judgment is therefore not just focussed on the individual's participation, but rather on the role each individual played in executing the overall objectives of the "gang". Whilst it is so that many accused persons are released on bail on serious offences, this matter is to be considered on its unique facts and circumstances.

[45] In relation to the Appellant's chronic medication, the state referred to ***Modack v Regional Commissioner, Western Cape, of the Department of Correctional Services and Another***³² where Lekhuleni J held:

'Lastly, the applicant contends that he received inadequate medical treatment at Helderstroom...the standing rule for all inmates is that if they need any medication, supplements or vitamins they need to see the resident doctor at this facility, who will prescribe it if is needed. If needed, the relevant medication is procured by the department and dispensed to the relevant detainees.'

[46] The court in ***Modack*** went on to distil the procedures to follow in the event that a detainee is dissatisfied with the treatment at prison. In *casu*, the medical condition of the Appellant, is to be viewed in the context of all other factors discussed earlier.

Conclusion

[47] It is trite that a court determining a bail application affected by Section 60(11) of the CPA, is required to consider the mosaic of evidence and decide on whether it is sufficient to persuade the court that an exception should be made to the

³² (4222/2021) [2022] ZAWCHC 139 (21 July 2022) at para 36.

default position. It is settled law that the court *a quo* is imbued with a wide discretion when deciding on an accused's release on bail. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the accused to adduce evidence and persuade the court that his or her release would be in the interest of justice.

[48] As previously mentioned, the consideration is whether the State has made out a *prima facie* case against the Appellant. This is to be weighed up against whether the Appellant has a valid defence which show on a balance of probabilities that he will be acquitted of the charge as stated in ***S v Mathebula***³³:

'...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...'

[49] The Appellant has not met the threshold envisaged in ***Mathebula***, by simply denying the veracity of the allegations. Something more is required. He is required to prove on a balance of probabilities that he will be acquitted, which the Appellant has failed to do. In my view, on the probabilities, there appears to be a strong *prima facie* case against the Appellant.

[50] There is an overabundance of authorities that reaffirms the limitations and powers of a Court of Appeal. The ultimate consideration is whether the Magistrate, who had the discretion to grant bail, exercised such discretion wrongly. Only one of the considerations set out in Section 60(4) of the CPA need be present to refuse bail.

³³ 2010 (1) SACR at para 12.

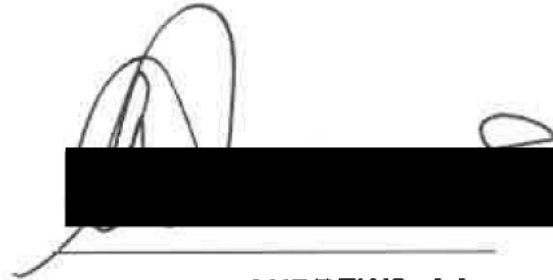
In this regard the court *a quo* was of the view that the Appellant was likely to breach one or more of the provisions of Section 60(4)(a) – (e). The court *a quo* had regard to the Appellant's personal circumstances, the relevant case authorities and the legislative prescripts and concluded that there was a strong *prima facie* case against the Appellant. The court *a quo* found that the Appellant's circumstances were of an ordinary nature and not exceptional.

[51] In my view, the court *a quo*, cemented its decision to refuse bail on more than one of the factors listed in Section 60(4). I am not persuaded that the imposition of strict bail conditions on a conspectus of the evidence of this matter will address the concerns raised more especially because POCA recognises that organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage. It therefore follows, that courts in dealing with interest of justice considerations pertaining to crimes invoking the provisions of POCA, are enjoined to consider same within the nature, context, purport and objectives of POCA which underscores the Bill of Rights in the Constitution which enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom.

[52] I am satisfied that the court *a quo* considered the objective facts and applicable legal principles and correctly found that the interest of justice does not permit the Appellant's release on bail. Consequently, I am satisfied that the court *a quo* correctly denied the Appellant's application to be released on bail.

Order:

[53] In the result the Appellant's appeal against the order by the court *a quo* refusing his application for bail is dismissed.




ANDREWS, AJ

APPEARANCES

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Date of Hearing: 23 July 2024

Date of Judgment: 07 August 2024